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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 71

MINE SAFETY APPLIANCE COMPANY,
APPELLANT,

vs.

JAMES V. FORRESTAL, [redacted]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED MAY 12, 1945.

SUPREME COURT OF THE UNITED STATES

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Record from D. C. U. S., District of Columbia—Continued

[fol. a-1] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action

File No. 23387

MINE SAFETY APPLIANCES COMPANY, a Corporation, 201 North Braddock Avenue, Pittsburgh, Pennsylvania, Plaintiff,

v.

FRANK KNOX, 4704 Linnean Avenue, Northwest, Washington, D. C.; James V. Forrestal, 1624 Twenty-ninth Street, Northwest, Washington, D. C., Defendants.

COMPLAINT FOR INJUNCTION AND OTHER RELIEF—Filed March 8, 1944.

1. Plaintiff, Mine Safety Appliances Company, is a corporation organized and existing under the laws of Pennsylvania with its principal place of business located at 201 North Braddock Avenue in the City of Pittsburgh, Commonwealth of Pennsylvania, and is a resident and citizen of Pennsylvania. Plaintiff has been since 1914, is now and was during the years 1941 and 1942, as well as at all other times hereinafter mentioned, engaged in the business of manufacturing, selling, and installing throughout the United States and for export, mining and industrial equipment and protective apparatus for the safeguarding of life and property.

2. As is hereinafter more fully set forth, the value of the rights which plaintiff in this suit seeks to protect and the value of the property and property rights and the extent of injury involved herein exceed $3,000, exclusive of interest and costs.

[fol. 2] 3. Defendant, Frank Knox, is a citizen of the United States and of the State of Illinois, a resident and inhabitant of the District of Columbia, and is the duly ap-

pointed and qualified Secretary of the Navy of the United States, and as such is charged with the duties of administering Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public Law 528, 77th Congress, Second Session, 56 Stat. 245, approved April 28, 1942), as amended by Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress, Second Session, 56 Stat. 982, approved October 21, 1942), as further amended by Section 1 of the Military Appropriation Act for 1944 (Public Law 108, 78th Congress, First Session, 57 Stat. 348, approved July 1, 1943), as further amended by the Act of July 14, 1943 (Public Law 149, 78th Congress, First Session, 57 Stat. 564), said statute and amendments thereof being hereinafter referred to as the Renegotiation Act.

4. Defendant, James V. Forrestal, is a citizen of the United States and of the State of New York, a resident and inhabitant of the District of Columbia, and the duly appointed and qualified Under Secretary of the Navy of the United States, and as such he is also charged with the duty of administering the Renegotiation Act, by direction of and delegation by the aforesaid defendant Knox. With respect to the matters herein complained of, said defendant Forrestal has at all times purported to act by virtue of authority and discretion delegated to him by defendant Knox and has assumed to act for and represent the Secretary of the Navy, the Secretary of War, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company, by virtue of an authority delegated to him by these respective bodies.

[fol. 3] 5. At all times hereinafter mentioned, the "renegotiations" hereinafter referred to were conducted in the first instance by a Price Adjustment Board sitting in Washington, D. C., and subsequently, by a Price Adjustment Board sitting in New York City, which Boards were appointed or designated by defendants and are purporting to act by virtue of authority and discretion delegated to them by defendant Forrestal.

6. Plaintiff avers upon information and belief that the following orders and directives have been issued pursuant to the Renegotiation Act, Section 6(f):

a. Under date of April 29, 1942 and again under date of December 16, 1942, defendant Knox delegated the authority conferred upon him by the Renegotiation Act to the Under Secretary to make such further delegations of the authority delegated as he deems to be necessary.

b. Effective October 20, 1943, the Secretaries of War, Navy and Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the Board of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company delegated to defendant Knox the authority and discretion conferred on them respectively by the Renegotiation Act to conduct renegotiations of the contract prices of contractors having contracts with their agencies.

c. Under date of June 22, 1943, defendant Forrestal established among others a Price Adjustment Board with divisions in New York and Washington and redelegated the authority conferred by the Renegotiation Act to said Price Adjustment Board.

7. This suit arises under the Constitution and Laws of the United States and plaintiff seeks primarily injunctive relief to suspend and restrain the enforcement, operation and execution of the Renegotiation Act and the unilateral determination by defendant Forrestal hereinafter referred [fol. 4] to, made thereunder on the ground that said Act is repugnant to the Constitution of the United States and that the unilateral determination thereunder is illegal and void. Plaintiff seeks to have this Honorable Court enjoin and restrain the defendants above named and each of them and anyone acting under them from enforcing or further proceeding under a unilateral determination promulgated under date of March 4th, 1944, by said defendant Forrestal, who is purporting to act under the authority of said Renegotiation Act. As will appear therefrom, said unilateral

determination is an affirmance of the determination of the Price Adjustment Board (New York Division) entered on January 4th, 1944. The determination of said Board is as follows:

"Navy Department
Price Adjustment Board
630 Fifth Avenue, New York 20, N. Y.

19 January 1944.

Mine Safety Appliances Company, Braddock, Thomas and Meade Streets, Pittsburgh, Pa.

Attention: Mr. John F. Beggy, Vice President

GENTLEMEN:

At a meeting held on January 17, 1944, the Board considered the memorandum dated January 12, 1944, signed by Mr. John F. Beggy, Vice President, and considered all of the other factors involved in the case. At this meeting the Board confirmed its previous determination that the Company had realized excessive profits of $550,000 for the year ended December 31, 1941, and excessive profits of $4,400,000 for the year ended December 31, 1942.

The Board has instructed me to inform you that the matter is being referred to the Under Secretary of the Navy for appropriate action.

Very truly yours, (S.) Joseph T. Owens, Lieut., U. S. N. R., Secretary, New York Division, Price Adjustment Board."

Plaintiff is unable to plead the memorandum dated Jan- [fol. 5] uary 12, 1944, referred to in the above quoted determination, by reason of the prohibitions against disclosure of secret, confidential or restricted matter as found in the statutes and executive orders governing the same.

8. The aforesaid unilateral determination of defendant Forrestal, purportedly made under the authority of said

Renegotiation Act, as received by Plaintiff, is in words and figures as follows:

"The Under Secretary of the Navy
Washington

March 4, 1944.

Mine Safety Appliances Company, Pittsburgh, Pennsylvania.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

GENTLEMEN:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941, and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any re-
[fol. 6] fund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours, (S.) James Forrestal."

9. Plaintiff avers that the aforesaid unilateral determination included the total of plaintiff's claimed renegotiable contracts for the years 1941 and 1942 without regard to whether each contract or purchase order involved $100,000 as said statute requires. Plaintiff avers that said unilateral determination is in this regard directly contrary to the provisions of said statute.

10. Plaintiff is the pioneer in the creation, development, and manufacture of safety equipment and protective ap-

paratus used in mining and industrial operations. Most of the products manufactured by plaintiff under normal conditions are its standard products and have a wide application in commercial and industrial fields. Under existing conditions, many of these products have been adapted to military purposes and plaintiff has contracts with virtually all of the government agencies.

11. Plaintiff has performed extensive and expensive research and developmental work but has kept as secret the results whenever requested to do so by the United States. Some of the items that plaintiff could have readily sold commercially as early as 1935 have been produced, at the request of our government, secretly and exclusively for our armed forces. If plaintiff had made these items available commercially, it would have given plaintiff a material advantage over its competitors and would have substantially redounded to its financial benefit.

[fol. 7] 12. Since 1935, directly and indirectly, plaintiff has made concessions to the government in addition to holding some of its products for the exclusive use of the government as aforesaid. Plaintiff avers that on contracts entered into beginning in 1939, the United States Government has been benefitted, according to plaintiff's calculations, to the extent of more than $12,000,000 arising out of contributions, concessions and price reductions on the part of plaintiff.

13. Plaintiff has willingly cooperated with the United States and its agencies with respect to making technical and manufacturing information available to the various agencies of the government. Plaintiff has also made available to the United States its research, technical, development, engineering, and manufacturing techniques, and these services have been utilized by the United States.

14. Plaintiff's operations at all times have been conducted with its own funds and personnel and without any direct or indirect financial assistance from the government. Plaintiff has at all times promptly and fully met its obligations to the Government of the United States, including the full payment of all taxes which plaintiff believes it owes to the government, which for 1941 were paid in the amount of $2,746,388.37 and for 1942 were paid in the amount of $9,115,761.98. Plaintiff avers that its estimated tax liability for 1943 is $7,250,000.

15. Plaintiff has conducted its operations efficiently with the result that its costs have been reduced and correspondingly it has conserved manpower and materials, many of the latter being highly critical in the present emergency.

16. Plaintiff's products, for the most part, are unique and require the highest technical skill in their manufacture and plaintiff has produced products at all times with the highest known standards.

17. In conducting its operations in the war effort, plaintiff has expended considerable effort and expense in assisting smaller concerns, giving them financial aid as well as making available to them plaintiff's engineering and technical staffs, supervisory forces, tools, and fixtures.

[fol. 8] 18. Since 1940, plaintiff has not materially increased its total compensation for its officers and executive employees even though the operations of plaintiff have greatly increased and the resulting responsibility and burden on those officers and employees has been correspondingly increased.

19. Plaintiff is informed and believes and, therefore avers that its costs and selling prices are the lowest in the industry for the quality of its products. Plaintiff's costs have been reduced over a long period of years and as these reductions have occurred, its selling prices have been correspondingly reduced to the great benefit of the United States both before and during the present war. Prior to any renegotiations with the Price Adjustment Board, plaintiff voluntarily reduced its prices to the United States in an amount of at least $8,700,000. Said reductions began as early as 1939.

20. Plaintiff avers that many of the contracts for the products manufactured by it for the United States are designated "secret," "confidential" or "restricted" and are within the provisions of the statutes and executive orders governing such contracts.

21. Defendant Forrestal, as disclosed by said final order and unilateral determination set forth in full in Paragraph 8 above, reached his conclusion through a consideration of financial, operating, and other data obtained from governmental or other sources believed by defendant Forrestal to be reliable. Defendant Forrestal has wholly failed and

neglected to inform plaintiff as to what financial, operating, and other data he took into consideration or how he used it or what weight he gave to it. At the conference on January 4, 1944, with the Navy Price Adjustment Board, New York Division, plaintiff requested but was refused a written statement disclosing the facts used by the Board in arriving at its conclusion. The only explanation given plaintiff was that the individual members of the above Board indicated by written ballot the percentage of the plaintiff's profit be-
[fol. 9] fore taxes the individual members believed should be retained by plaintiff, and an average of said ballot was taken. Plaintiff was also informed that the profits on its commercial business had been taken into consideration by the Board in arriving at its conclusion. Plaintiff avers that the defendant Forrestal and the above Board reached their conclusions arbitrarily, capriciously, unreasonably, and in violation of the plaintiff's legal rights.

22. Plaintiff is informed, believes and expects to be able to prove that contracts which have been considered by defendant Forrestal and the Price Adjustment Board (New York Division) in making his unilateral determination for the years 1941 and 1942 were partially or totally performed by plaintiff prior to April 28, 1942. Defendant Forrestal and the Board undertook for the years 1941 and 1942, unilaterally to refix the prices, or to redetermine the overall profits arising therefrom, of contracts and supplements thereto between plaintiff and the United States Government and its agencies which had been entered into as early as 1940 and totally and partially performed by plaintiff prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff avers that delivery of a substantial part of the material called for by said contracts had been made by plaintiff during 1941 and prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff avers, upon information and belief, that a substantial part of the dollar value of the contracts which must have been considered by defendant Forrestal and the Board were totally or partially performed by plaintiff prior to April 28, 1942, October 21, 1942 and July 1, 1943. Plaintiff is informed, believes and expects to be able to prove that the Navy Price Adjustment Board (New York Division) took into consideration the foregoing facts in arriving at its conclusion and imposed the same retroactive construction of the Renegotiation Act on plaintiff's business for

the years 1941 and 1942 in order to recapture alleged excessive profits for those years.

23. Plaintiff is informed, believes and expects to be able to prove that the personnel of the Price Adjustment Board, New York Division, consisted of four (4) members, three of whom were accountants, the fourth having been a broker [fol. 10] and is presently engaged in farming, and none of whom had had any experience in a business similar to that of plaintiff. Plaintiff avers that the said Board acknowledged that it knew of no business which was comparable to plaintiff's. Although plaintiff urged that it do so, no member of the Board had visited plaintiff's plant to familiarize himself with plaintiff's operations. Plaintiff avers that the said Board was not in a position to do so and could not have taken into consideration the "General Principles and Factors" which had been promulgated by the various Departments under date of March 31, 1943 and which are incorporated herein by reference thereto.

24. Plaintiff has contracts entered into prior to April 28, 1942, as aforesaid, and totally performed by plaintiff and the United States including final payment thereunder prior to April 28, 1942, but the total amount of business represented by such contracts has been considered by defendant Forrestal and the Board in making his unilateral determination for the years 1941 and 1942 by reason of supplementary orders having been placed (both prior to April 28, 1942 as well as subsequent to April 28, 1942) calling for plaintiff furnishing items on the same basis as furnished under the original contracts, some of which supplementary orders were not paid for prior to April 28, 1942. Included in the total amount claimed by the Navy Price Adjustment Board, as plaintiff is informed, believes and expects to be able to prove, to be renegotiable for the years 1941 and 1942 were shipments made by plaintiff on which total payments (in a substantial amount) were not made by the government during the years of such shipments, 1941 and 1942 respectively, but payments were made during the years 1943 or 1944 or payments were still not made as of February 29, 1944. The books of plaintiff do not include reserves for uncollectible accounts or adjustments or reductions in the amount claimed for shipments and even if such items were so included, they would not have been allowed by the defendant Forrestal or the Navy Price Adjustment Board (New York Division)

in considering the deductions to which plaintiff would be entitled in arriving at plaintiff's profits. Plaintiff is in-
[fol. 11] formed, believes and expects to be able to prove that a material part of the business of the plaintiff which has been considered by defendant Forrestal and the Board in making the unilateral determination is covered by billings made by plaintiff prior to April 28, 1942 for contracts totally performed by plaintiff prior thereto but not paid for by the United States Government as a result of its own delays, until after April 28, 1942.

25. Plaintiff has reinvested and risked in the war effort a sum in excess of $6,264,184.14, representing 109% of the surplus account of the plaintiff as of December 31, 1942 as shown on the books of the Company. On December 30, 1942 and December 14, 1943, plaintiff received cancellations of some of its confidential contracts which have resulted in the plaintiff incurring severe financial losses. These losses include a liability estimated at $300,000 to subcontractors and impairment of plaintiff's working capital because of plaintiff having on hand an inventory of products to fill these cancelled contracts. Plaintiff avers it estimates that the inventory of products represents a cost of $650,000 which plaintiff may never fully realize or in any event, will probably only realize over a long period of years and then probably only partially. Defendants refused to consider such items.

26. Since the inception of renegotiation proceeding, plaintiff has insisted that neither factually nor legally is there a basis for a determination by defendants or their subordinates of excessive profits for 1941 or 1942 on its business, and that the Renegotiation Act is unconstitutional.

27. Plaintiff avers that said Renegotiation Act is in violation of its rights as guaranteed to it by the Constitution of the United States and is void and without legal effect because among other things,

[fol. 12] (a) It is repugnant to Article I, Section 1; Article I, Section 8, Clause 18, and Article III, Section 1 of the Constitution of the United States in that it delegates legislative and judicial power and unlimited discretion in the application and enforcement of said Act to the defendants, the Secretaries of the Departments, and to their subordinates;

(b) It is repugnant to Amendment V to the Constitution of the United States in that it deprives plaintiff of its property without due process of law;

(c) It is repugnant to Amendment V to the Constitution of the United States in that it takes plaintiff's property for public use without just compensation;

(d) The Act permits and it has been applied by the executive agencies as to plaintiff, arbitrarily, capriciously and unreasonably and in violation of plaintiff's constitutional rights;

(e) It is repugnant to Amendment X to the Constitution of the United States in that it exercises a power not delegated to the United States;

(f) The Act is in violation of plaintiff's constitutional rights in that it is impossible for plaintiff to obtain a fair hearing inasmuch as the executive agencies designated to determine the question of refixing of the contract prices are the agencies who directly or indirectly made the contracts with the plaintiff and hence are not unprejudiced and impartial.

(g) Insofar as the statute provides that the executive officers named therein shall have the right to determine the excessiveness of profits of plaintiff on its total business for the years involved, it is in legal effect a delegation by Congress to the respective executive officers of the right to impose taxes and is, therefore, in violation of Article I, Section 1; Article I, Section 8, Clause 1, and Article I, Section 8, Clause 18 of the Constitution of the United States.

[fol. 13] 28. The Renegotiation Act (which includes the amendments to July 14, 1943) under which plaintiff's renegotiations were carried on does not provide among other things for:

(a) Any standards, policies, or rules to guide the executive officials or such of the personnel to whom they may delegate or who may re-delegate the discretion and power conferred by the Act in refixing contract prices or in determining whether excessive profits have been earned;

(b) Any legal protection against the uncontrolled legislative or judicial powers delegated to defendants and their

executive subordinates and the alteration, amendment or repeal of such powers or the rules prescribed thereunder by defendants or their executive subordinates;

(c) Any legal protection against arbitrary or capricious conclusions or determinations;

(d) Any limitation upon, or description of, the character of the material, data, and factors which may be considered by the executive officials or the personnel to whom they may delegate or may re-delegate the discretion and power conferred by the Act;

(e) A legal hearing, public or otherwise after due notice;

(f) The reception of evidence, or the right to cross-examine with respect thereto;

(g) Disclosure to the plaintiff of material data and the factors considered;

(h) Disclosure to plaintiff of the manner in which any material, data and factors was applied or used;

(i) Any record of the proceedings, findings of fact, statement of grounds or other disclosure of, the basis of the decision;

(j) Any judicial review;

(k) And furthermore, there are no regulations promulgated which provide for adequate protection against and recovery of losses, costs, and other contingencies;

and in these respects and in each thereof, is repugnant to Article I, Section 1 and Article I, Section 8, Clause 18, of the Constitution of the United States and to the Fifth and Tenth Amendments thereto.

[fol. 14] 29. As of February 29, 1944, there was due to plaintiff from the United States and its agencies or instrumentalities for shipments made and billed approximately the sum of $2,700,000. Said sum and other sums which may become due in the future, defendant Forrestal will direct, as appears in said order, to be withheld from plaintiff unless restrained and enjoined by this Honorable Court. As will appear from the averments in this complaint, such action by defendant Forrestal will tie up funds of the plaintiff far in excess of the amount actually needed to protect the United States.

30. The amount due the plaintiff from the United States Government is payable through numerous disbursing offices located throughout the United States, and the effect of the threatened withholding order, unless restrained and enjoined by this Honorable Court, will thus be to prevent the plaintiff from receiving payment on any of the accounts upon which money is due and payable to plaintiff from the government which will result in irreparable damage and injury to the plaintiff while giving the government an unjustifiable amount even if defendant Forrestal's unilateral determination is valid, constitutional, and enforceable.

31. In addition, plaintiff now has inventories of raw and finished materials and work in process or unfilled purchase orders for materials contracted for by the United States and its agencies or instrumentalities but not yet due in the sum of approximately $12,000,000. Plaintiff also has orders on its books from commercial customers in the amount of approximately $1,000,000.00.

32. As of February 29, 1944, plaintiff had on its books contracts to furnish products to the government totalling approximately $19,000,000.00. In order that plaintiff may carry on its operations to fulfill its contracts with the government and the needs of our fighting forces, it is necessary for plaintiff to purchase with its own funds and [fol. 15] furnish to its subcontractors materials for the performance of said contracts and as well to make payments out of plaintiff's funds to its subcontractors both prior to the receipt of payment from the United States. The withholding of the plaintiff's funds will seriously interfere with the plaintiff in carrying on its operations and will seriously interfere with the production of the critical materials required by the United States Government.

33. Plaintiff also avers that the greater portion of plaintiff's contracts involved herein are confidential, secret or restricted and are within the provisions of the various statutes and executive orders forbidding disclosure of their contents and it will, therefore, be impossible for plaintiff to carry on proceedings for the enforcement of its contract rights until said statutory and executive restrictions are lifted. Plaintiff is likewise restricted as to its patents and patent applications.

34. With respect to the unconstitutional statute and the unconstitutional exercise of power by the defendants herein,

plaintiff is without a plain, adequate and complete remedy at law.

(a) Plaintiff avers the legal effect of defendants' withholding order amounts to the imposition of an illegal penalty upon plaintiff.

(b) If plaintiff be regarded as having a legal remedy (which plaintiff denies it has) in the nature of a right to sue the United States for sums of money to be withheld under order of defendants and to sue each prime contractor where he may be found to recover such sums of money as the defendants may direct such contractor not to pay to plaintiff, plaintiff will be compelled to bring numerous suits at law. The number of plaintiff's customers whom the defendants threaten to instruct to not pay plaintiff monies due it are numerous and they are located throughout the United States.

[fol. 16] Thus—

(a) The large number of suits at law, which plaintiff would be required to bring, would in many instances be in localities far removed from plaintiff's offices and plant;

(b) Such multiplicity of actions would be costly and vexatious;

(c) Suits at law of the character above described, would cast upon contractors, many of whom owe plaintiff small sums of money, the duty of litigating with plaintiff grave questions of constitutional and great public import in which those contractors may not have a direct interest;

(d) If plaintiff should be forced to such a course of litigation for the protection of its rights, an irreparable disruption of its relations with its customers would ensue. Ill feeling likely would be engendered and plaintiff's property rights in the good-will now existing between plaintiff and its customers may be irreparably injured, and the normal flow of business with those customers may be impeded;

(e) If plaintiff's customers are instructed not to pay plaintiff for materials already delivered to them by plaintiff, plaintiff will be forced to select one of two courses of conduct with respect to continuing shipments to those customers, either of which is irreparably disadvantageous. If plaintiff under such circumstances shall continue to supply

products to such customers, it may jeopardize the interests of the holders of its capital stock in substantial degree, and if it shall refuse to make such shipments there will be an unnecessary deleterious effect upon the war effort.

Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of the Court, from

[fol. 17] (1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor or subcontractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by the methods of enforcement sought to be provided by said Renegotiation Act, or by any other method,

(b) That a special court of three judges be constituted to hear and determine this cause pursuant to statute;

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

(e) That upon final hearing, the Court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, unenforceable against plaintiff;

(f) That upon final hearing the Court, pursuant to the provisions of the Federal Declaratory Judgment Act de-

clare and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against plaintiff;

[fol. 18] (g) That plaintiff have such other and further relief as the nature of the case may require and to the Court may seem just and proper in the premises.

Stewart and Lewis, by W. Denning Stewart, 1017 Park Building, Pittsburgh, Pennsylvania; Howard Zacharias, 1103 Law and Finance Building, Pittsburgh, Pennsylvania; Mills and Kilpatrick, by Charles Effinger Smoot, 912 American Security Building, Washington 5, D. C., Attorneys for Plaintiff.

Duly sworn to by J. F. Beggy. Jurat omitted in printing.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION SUSPENDING PAYMENT AND INTERMEDIATE ACTION—Filed March 11, 1944

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the com-

plaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

[fols. 20-24] 2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

Mills and Kilpatrick, by Charles Effinger Smoot, W. Denning Stewart, Counsel for Plaintiff. Francis M. Shea, Asst. Atty. Gen., Counsel for Defendants. 3/9/44.

[fol. 25] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed June 12, 1944

Defendant James V. Forrestal answers the complaint herein as follows:

First Defense

1. The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

2. The court lacks jurisdiction in that the suit is in reality against the United States, which has not consented to be sued.

Third Defense

3. The court lacks jurisdiction in that the plaintiff has a plain, adequate, and complete remedy at law.

Fourth Defense

4. Plaintiff has failed to exhaust his administrative remedies.

Fifth Defense

5. The plaintiff is not entitled to the relief sought in that, [fol. 26] so far as it is pertinent here, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is constitutional, and in any event is valid as against plaintiff by reason of plaintiff's assent thereto; the procedure followed in this case was correct, proper and reasonable, and in any event was assented to by plaintiff; and the determination made by defendant was correct, proper, and reasonable.

Sixth Defense

6. In April, 1942, the Congress of the United States was faced with the problems of a nation at war. It was already apparent that huge profits were being made out of war conditions and, unless appropriate measures were taken immediately, there would be war profiteering on an unprecedented scale, to the detriment of the public purse, the public morale, and the public interest. It was also apparent that many normal peacetime safeguards in the field of procurement had to be discarded. In the urgency of prosecuting the war effort, speed in arranging for production had to be a prime consideration in the execution of contracts. It was necessary that contracts be entered into before a fair and reasonable basis for such contracts could be correctly determined. To what extent the tremendous expansion of production and the means of production would affect costs was not known, nor could government or management have ascertained in advance to what extent methods of mass production could be applied in fields in which the quantities of production had theretofore not required the extensive application of such technique. Contracts had to be let for materials of war as to which no previous or adequate cost experience was available. The war situation did not permit detailed study and analysis of such considerations by Government and industry, and bargaining on the basis thereof.

7. Shortly before April, 1942, the Supreme Court of the United States had spoken with respect to the problems of war and of war profits. The Court noted the various measures which the Congress had taken at times to meet the "recurrent evil of war profiteering" and recognized the possible need "that still other measures must be devised." But if the executive is in need of additional laws by which [fol. 27] to protect the nation against war profiteering," the Court stated, "the Constitution has given to Congress, not to this Court, the power to make them." *U. S.* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309 (1941).

8. To meet the responsibility of protecting the nation against inordinate war profits and of providing effectively for the gigantic task of wartime procurement, and after carefully considering various other measures which were upon such consideration found to be inadequate, the Congress incorporated Section 403 in the Sixth National Defense Appropriation Act, 1942, approved April 28, 1942, which, as amended, is known as the Renegotiation Act. All action of defendant and of his subordinates and subordinate bodies pertinent to the issues here was taken pursuant to the Renegotiation Act, and authority duly delegated thereunder.

9. During June, 1942, an auditor was authorized by the Navy Department to advise and assist plaintiff in the preparation of a report relating primarily to plaintiff's costs, expenses, profits and other pertinent data concerning contracts between plaintiff and the Navy Department. The report submitted by plaintiff through such auditor was dated July 1, 1942, and submitted to the Navy Price Adjustment Board on or about July 7, 1942.

10. On August 17, 1942, the first meeting between the Navy Price Adjustment Board and plaintiff's representatives was held in Washington, D. C. After mutual discussion of pertinent factors, the Board proposed that plaintiff's profits on Navy business for 1941 and 1942 should be reduced. Plaintiff's representatives were furnished with a copy of the company's past earnings statement, an estimate of its earnings for 1942, and a list of items of cost which had been disallowed. The meeting was then adjourned in order to give plaintiff's representatives an opportunity to review such statements and estimate, and

[fol. 28] it was agreed to hold another meeting on August 31, 1942.

11. At a second meeting in Washington, D. C., on August 31, 1942, the company's representative gave the Board a balance sheet and a profit and loss statement as of June 30, 1942, and a written memorandum containing details of the company's past performance. After fully considering all the facts concerning the company and the facts and arguments presented by its representatives, during an adjournment taken for the purpose, the Board made a proposal to the company's representatives for the elimination of excessive profits realized and likely to be realized for the fiscal year 1942. The Chairman of the Board also stated that it was the Board's opinion that plaintiff's profits on war business during 1941 were abnormally high. Plaintiff's representatives stated that they would answer the Board's proposal in about a week, after the company's directors had considered the proposal.

12. The third meeting between the Board and plaintiff's representatives was held September 30, 1942. The plaintiff's president made a counter-proposal. No agreement to eliminate excessive profits resulted from this meeting.

13. The fourth in the series of meetings between the Navy Price Adjustment Board and plaintiff's representatives was held December 30, 1942. The company's representatives submitted certain data, but said that the statement showing its financial operations during 1942 would not be ready until February, 1943. The meeting was then adjourned pending receipt of such information.

14. In June, 1943, a representative of the Navy Department was sent to plaintiff's office to assist plaintiff in the preparation of financial data relating to its operations for the year ended December 31, 1942, and particularly relating to the segregation of plaintiff's sales, costs and expenses, [fol. 29] and profits for such year into renegotiable and non-renegotiable business. The data prepared by such representative and plaintiff's officers and employees were typed in report form by plaintiff and submitted by plaintiff to the Navy Price Adjustment Board (New York Division) in September, 1943, as its statement of renegotiable and non-renegotiable business for the year ended December 31, 1942.

15. On December 28, 1943, a fifth meeting was held by the Board with the company's representatives. Plaintiff was represented by George H. Deike, president and treasurer; John H. Beggy, vice-president, secretary and assistant treasurer; W. Denning Stewart and Howard Zacharias, attorneys. The Navy Price Adjustment Board members present were Comdr. N. L. McLaren, chairman of the meeting; P. C. Ward, L. Montamat and W. R. Hill, Jr., who collectively represented a broad experience in connection with the financial, executive and general problems of a great variety of businesses. Representatives of the Board's Analysis Division and of the Office of Procurement and Material were also present. Facts concerning the company's operations during 1942 were discussed, and the company's representatives were given full opportunity to describe its business operation and to present any and all evidence and arguments which it deemed material with respect to the renegotiation of its contracts.

16. The Board then considered the renegotiation of plaintiff's 1941 renegotiable business. Plaintiff's attorney objected to the renegotiation of any of the company's 1941 business.

17. Plaintiff's representatives stated that they believed the Board did not have enough information regarding its business to enable the Board to conduct renegotiation proceedings at that time, and that a comprehensive memorandum regarding the company's business and legal position had just been prepared. The chairman of the meeting orally [fol. 30] reviewed point by point the information contained in a report which had been prepared for the Board by its Analysis Division. In order to give the Board members an opportunity to consider the additional information in the company's memorandum, the meeting was adjourned.

18. On January 4, 1944, meeting number six was held. The chairman of the meeting stated that all of the Board members present had read the company's memorandum dated December 28, 1943, and had considered the contents thereof. He reminded the company's representatives that at the close of the December 28, 1943 meeting he had reviewed the report prepared for the Board by its Analysis Division point by point, more fully to inform the company of the facts which the Board would consider in reaching a conclusion as

to whether or not plaintiff had realized excessive profits. He stated that this was the sixth meeting with the company and that he believed the Board had all the facts necessary to enable it to make a determination, but said nevertheless that the Board would be glad to hear and consider any additional statement or facts that the plaintiff's representatives wished to present.

19. Mr. Stewart, the company's attorney, said that the company's performance justified a finding that it had realized no excessive profits during 1941 or 1942. He said that the Board should leave well enough alone and by doing so encourage the company to continue to put forth its best efforts to serve the Government. The chairman asked whether the Board was to infer that if it made a determination of excessive profits, the company would relax its efforts to produce war materials. Mr. Stewart answered that the Board should be realistic and should realize that the company might be discouraged if it thought that any profits resulting from its efforts would be eliminated. He said that the company was working on new developments [fol. 31] of great importance to the Government and that it was more important to encourage the company to continue its developmental program than to obtain a refund.

20. After further discussion the meeting was temporarily adjourned so that the members of the Board might consider the facts and arrive at a decision. In determining whether and to what extent the plaintiff had made excessive profits in 1941 and 1942, the Board considered all the "General Principles Followed and Factors Considered in Determining the Existence of Excessive Profits," to the extent present, set forth at pages 7 and 8 of the "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission" of "Purposes, Principles, Policies and Interpretations" applicable under the Renegotiation Act, which had been promulgated under date of March 31, 1943. In particular, the Board considered the plaintiff's production record and the performance of its products; the fact that the plaintiff had not been financed or furnished facilities by the United States to increase its capacity for manufacturing war products; the company's developmental contribution with respect to certain products; and the withholding of one such product in particular from commercial distribution at the request of the Navy; the reductions in

price made by the company; the efficient and economic manner in which the company had conducted its operations; the extent of its subcontracting; and all other facts presented by the company. Upon the basis of such consideration and after a full discussion of all the facts and factors, the Board reached a conclusion as to the amount of excessive profits realized by plaintiff during the years ended December 31, 1941 and December 31, 1942, on contracts and subcontracts subject to renegotiation.

21. The meeting was thereafter resumed and the Board, through the chairman, told plaintiff's representatives that [fol. 32] the Board suggested a refund of $4,400,000 for the fiscal year ended December 31, 1942, and that it estimated that after the application of the credit for taxes previously paid, such refund would amount to about $875,000 in cash and $350,000 in reduction of post-war credit. Upon renegotiable sales for the year ended December 31, 1941, totalling $2,941,524, the Board suggested a refund of $550,000 and stated that it estimated that after application of the credit for taxes paid, such refund would amount to about $152,000 in cash. The company's representatives agreed to notify the Board within ten days whether or not the company would agree to the proposed refund.

22. Thereafter, plaintiff submitted a written statement to the Board, dated January 12, 1944, signed by J. F. Beggy, vice-president of plaintiff, and headed "Confidential," which set forth arguments and purported facts, in large part repetitive of data and contentions previously submitted, to support plaintiff's contention that it had realized no excessive profits during the years ended December 31, 1941, and December 31, 1942. The said written statement concluded with a rejection of the Board's proposal, and a request for reconsideration.

23. At a meeting held January 17, 1944, the board reconsidered and confirmed the conclusion arrived at January 4, 1944. Plaintiff was notified thereof by a letter dated January 19, 1944, which is set forth in paragraph 7 of the complaint.

24. Thereafter, the Board reported to the Secretary of the Navy its proposal to plaintiff and plaintiff's rejection of such proposal. It transmitted to the Secretary all pertinent papers, including the documents submitted by plain-

tiff and the minutes of the six meetings with plaintiff. The Board recommended issuance of a unilateral determination.

25. By letter dated January 28, 1944, Hon. Ralph A. Bard, [fol. 33] as Acting Secretary of the Navy, wrote to plaintiff as follows:

> "The Price Adjustment Board of the Navy Department (New York Division) has advised me that it has been unable to reach a voluntary agreement with you with respect to the excessive profits realized by you under Section 403 for your fiscal years ended December 31, 1941, and December 31, 1942. The Board has recommended the issuance by me of a unilateral determination with respect to the $550,000 of excessive profits for the year ended December 31, 1941, and $4,400,000 of excessive profits for the year ended December 31, 1942, found by the Board to have been earned by you for such fiscal periods.
>
> "Before doing so, however, I wish to grant you a full opportunity to submit any additional information and to present any contentions deemed material by you in determining the excessiveness of said profits and the renegotiability of the contracts and subcontracts giving rise thereto.
>
> "If you wish to be heard with respect to the determination of excessive profits for your fiscal years ended December 31, 1941, and December 31, 1942, please advise me not later than February 10, 1944. Otherwise, action will be taken to eliminate such excessive profits for your fiscal years ended December 31, 1941, and December 31, 1942, by directing the withholding of payments otherwise due to you in accordance with the provisions of the statute."

26. By letter dated February 7, 1944, and signed by J. F. Beggy, the vice-president, plaintiff wrote to Hon. Ralph A. Bard, Acting Secretary of the Navy, as follows:

> "Receipt is acknowledged of your letter of the 28th ult. with reference to the above entitled subject matter.
>
> "We note that you desire to give this company a full opportunity to submit any additional information and to present any contentions deemed material by it in

determining the excessiveness of the profits and the renegotiability of the contracts and subcontracts giving rise thereto.

"You are advised that this company desires to avail itself of the opportunity above referred to. It has been the position of this company from the inception of the renegotiation proceedings that neither factually nor legally is there a basis for a determination of excessiveness of profits for the years involved, and the company desires to present these positions at length to you.

"As you did not indicate in your letter the date of [fol. 34] any hearing which you may afford this company, we would appreciate it if you would fix the date for such hearing after February 21, as there are pressing matters which make it impossible for the representatives of this company and our counsel to be present before that date."

27. Thereafter, defendant James V. Forrestal, then Under Secretary of the Navy, became available to meet plaintiff's representatives on February 22, 1944, and did meet them on that day. He examined and considered the financial, operating and other data and arguments theretofore submitted to the Navy Price Adjustment Board by the plaintiff and some data obtained from governmental and other reliable sources. He also considered each of the facts and contentions presented by plaintiff orally and an additional statement dated February 17, 1944.

28. After such examination and consideration, and having afforded plaintiff full opportunity to submit any additional information and to present any contentions deemed material, defendant, in his then capacity of Under Secretary of the Navy, found and determined that $550,000 of the profits realized by plaintiff during the year ended December 31, 1941, and $4,400,000 of the profits realized by plaintiff during the year ended December 31, 1942, under contracts and subcontracts subject to the Renegotiation Act, were excessive.

29. The said finding and determination of defendant is set forth in his letter to plaintiff dated March 4, 1944, the text of which is quoted in paragraph 8 of the complaint.

30. On March 8, 1944, the complaint herein was filed. Thereafter counsel for the parties herein stipulated as follows:

"1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment [fol. 35] upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

"2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944, referred to in paragraph 1.

"3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint here, or otherwise.

"4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

31. Pursuant to said stipulation, defendant is now holding unpaid vouchers payable to plaintiff in the amount of

$1,050,000. Said amount already withheld is sufficient fully to satisfy the obligation of the plaintiff for excessive profits determined to be due. There is, therefore, no occasion to seek any additional amounts or any other method of collection, and defendant has no reason to, and does not intend to seek any additional amounts or any other method of collection.

32. Plaintiff's renegotiable sales for the year ended December 31, 1941, amounted, on the basis of data secured from plaintiff's books, to $2,941,524.04. Plaintiff's profits on said sales amounted, on the basis of such data, to $940,299.73, or an operating profit in relation to sales of 32 per cent. Plaintiff's profits on such renegotiable sales after elimination of the $550,000 of excessive profits, amount to $390,299.73, which represents a profit of 16.3 per cent on plaintiff's adjusted renegotiable sales of $2,391,524.04 for [fol. 36] such year. Allowing for the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code, elimination of the excessive profits in the amount of $550,000 results in a reduction in net profits after taxes of only $140,037.15. The Navy Price Adjustment Board and defendant, did not consider plaintiff's non-renegotiable business in arriving at their respective conclusions as to plaintiff's realization of excessive profits for the year ended December 31, 1941. Defendant has been informed and believes, and therefore avers, that plaintiff's books would show that its net profit for the year 1941, after payment of taxes and after elimination of the excessive profits determined to have been realized, amounts to $1,183,387.07, and that this amount of net profit is in excess of 23 per cent of plaintiff's net worth at the beginning of said year.

33. Plaintiff's renegotiable sales for the year ended December 31, 1942, amounted, on the basis of data furnished by plaintiff, to $23,957,238.61 and plaintiff's operating profits on said sales amounted, on the basis of such data, to $6,737,140.87, or an operating profit in relation to sales of 28.1 per cent. Plaintiff's profits on such renegotiable sales for the year ended December 31, 1942, after elimination of the $4,400,000 of excessive profits amounted to $2,337,140.87, which represents a profit of 11.95 per cent on plaintiff's adjusted renegotiable sales of $19,557,238.61. Allowing for the tax credit to which plaintiff is entitled under Section 3806 of the Internal Revenue Code, elimination of the ex-

cessive profits in the amount of $4,400,000 results in a reduction in net profits after taxes of only $874,836.63 and a reduction of post-war credit of $349,934.64. The Navy Price Adjustment Board (New York Division) and defend- [fol. 37] ant did not consider plaintiff's non-renegotiable business in arriving at their respective conclusions as to plaintiff's realization of excessive profits for the year ended December 31, 1942. Defendant has been informed and believes, and therefore avers, that plaintiff's books would show that its net profit for the year 1942, after payment of taxes, and after elimination of the excessive profits determined to have been realized, amounts to $1,948,345.90, and that this amount of net profit is in excess of 31 per cent of plaintiff's net worth at the beginning of said year.

34. Plaintiff's annual volumes of sales and its profits thereon for the base-period years of 1937 to 1940, inclusive, were as follows:

	Sales	Operating Profits Before Taxes	Percentage of operating profits to Sales	Net Profits After Taxes	Return on Net Worth	Opening Net Worth (per books)
1937	4,670,719	463,127	9.92	333,127	.....	.....
1938	4,821,983	565,664	11.73	458,664	12.05	3,806,422
1939	5,309,165	525,085	9.89	415,085	9.97	4,165,054
1940	8,327,149	1,044,713	12.55	619,713	13.71	4,518,544
Average	5,782,254	649,647	11.24	456,647	.....	.....

35. The finding and determination of the Under Secretary of the Navy, as aforesaid, are correct, reasonable, and justified both in fact and in law.

Seventh Defense

36. Defendant admits the allegations in the first sentence of paragraph 1 of the complaint. Answering the allegations in the second sentence of said paragraph, defendant admits that in 1941 and 1942 plaintiff has engaged in the business described in said allegation, but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said sentence.

37. Defendant denies the allegations in paragraph 2 of the complaint. Defendant admits that the net amount of the excessive profits determined to be due for the years 1941 and 1942 is approximately $1,015,000.

[fol. 38] 38. Defendant Forrestal admits the allegations in paragraph 3 of the complaint, except that defendant sug-

gests that since this action was commenced, Frank Knox has died.

39. Defendant admits the allegations in paragraph 4 of the complaint, except that defendant suggests that since this action was commenced, James V. Forrestal has been appointed Secretary of the Navy.

40. Defendant admits the allegations in paragraph 5 of the complaint.

41. Defendant admits the allegations in subparagraphs 6a and 6b of the complaint. Answering subparagraph 6c of the complaint, defendant admits that he established a Price Adjustment Board with divisions in New York, N. Y. and Washington, D. C. by a directive dated June 22, 1943 and that he delegated to said Board some, but not all of his authority under the Renegotiation Act.

42. Defendant is not required to answer the allegations in the first two sentences of paragraph 7 of the complaint. Answering the remaining allegations in said paragraph, defendant admits that the memorandum referred to in the last sentence of said paragraph contains some confidential material; defendant refers to the averments set forth in paragraph 18 to 29, inclusive of this answer, and except as admitted or then averred, denies the said allegations.

43. Defendant admits that he wrote plaintiff the letter quoted in paragraph 8 of the complaint, but refers to paragraphs 30 and 31 of this answer for a statement of the procedure which was adopted to eliminate the excessive profits found to have been realized by plaintiff.

44. Defendant admits the allegations in paragraph 9 of the complaint that he included in the plaintiff's business determined to be renegotiable, some contracts and purchase orders involving less than $100,000. The remaining allega- [fol. 39] tions in said paragraph are conclusions of law which defendant is not required to answer; defendant nevertheless denies the same.

45. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the complaint, except that defendant admits that some of plaintiff's products have been adapted to military use and that plaintiff has contracts with some agencies of the United States.

46. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the complaint, except that defendant admits that since 1935 plaintiff has produced, at the request of the United States, some products exclusively for the armed forces.

47. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the complaint, except that defendant admits that since 1935 plaintiff has made some direct and indirect concessions to the United States and has produced some products exclusively for the said United States.

48. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the complaint, except that defendant admits that plaintiff has made available to the United States some of its technical and manufacturing information and techniques and that the United States has utilized some of such information and techniques.

49. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14 and 15 of the complaint.

50. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in [fol. 40] paragraph 16 of the complaint, except that defendant admits that some of plaintiff's products are made by plaintiff alone and some of its products require technical skill in their manufacture.

51. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 17 and 18 of the complaint.

52. Defendant is without any knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the complaint, except that from time to time some of plaintiff's costs have been reduced as have some of plaintiff's selling prices to the United States.

53. Defendant admits the allegations in paragraph 20 of the complaint.

54. Answering the first sentence in paragraph 21 of the complaint, defendant refers to the full text of his unilateral

determination set forth in paragraph 8 thereof. Answering the last five sentences of said paragraph 21, defendant refers to the averments set forth in paragraphs 9 to 35, inclusive, of this answer and, except as there averred, denies the allegations in said five sentences of paragraph 21.

55. Defendant denies the allegations in paragraph 22 of the complaint, except that defendant admits that in making the determination for the years ended December 31, 1941, and December 31, 1942, contracts or subcontracts were considered by the Navy Price Adjustment Board and by defendant, which had been made and performed to some extent prior to April 28, 1942, but with respect to which final payment had not been made prior to such date. Defendant further admits that in making the determination as to plaintiff's excessive profits for such years, he and the Navy Price Adjustment Board (New York Division) considered as renegotiable some contracts performed to [fol. 41] some extent prior to April 28, 1942, October 21, 1942 or July 1, 1943, and under which final payment had been made on or after April 28, 1942, and prior to October 21, 1942, or July 1, 1943.

56. The allegations in the first three sentences of paragraph 23 of the complaint are irrelevant to any issue in this proceeding, but are nevertheless denied, except that defendant admits that no member of the Navy Price Adjustment Board (New York Division) panel which considered plaintiff's case, has ever been an officer or employee of a company manufacturing and selling or renting safety appliances similar to those manufactured and sold or rented by plaintiff, and that no such member personally visited plaintiff's plant. Defendant denies the allegations in the last sentence of said paragraph.

57. Defendant denies the allegations in paragraph 24 of the complaint, except that defendant admits that he and the Navy Price Adjustment Board (New York Division) considered some contracts to be renegotiable for the years ended December 31, 1941, and December 31, 1942, under which some shipments were made during either or both of such years or some billings were made by plaintiff prior to April 28, 1942, but final payments thereunder were not made by the United States until times subsequent to April

28, 1942 and in some instances, until times subsequent to the year in which such shipments were made. Defendant further admits that with respect to sales made to the United States plaintiff's books include no reserves for uncollectible accounts or adjustments or reductions in the amount claimed for shipments, and avers that the remainder of the allegations in the third sentence of said paragraph 24 are speculative and irrelevant and therefore require no answer.

58. Defendant denies the allegations in paragraph 25 of the complaint, except that defendant admits that the United [fol. 42] States cancelled some of plaintiff's contracts on and after December 30, 1942.

59. Defendant admits the allegations in paragraph 26 of the complaint.

60. The allegations in paragraph 27 of the complaint are conclusions of law which defendant is not required to answer. Nevertheless, so far as these conclusions of law are pertinent to any issue here, defendant denies the same.

61. Answering paragraph 28 of the complaint, defendant refers to the text of the Renegotiation Act, as amended and as applicable to fiscal years ended prior to July 1, 1943, for a statement of the provisions thereof and denies, so far as they may be in issue here, that said provisions, or any of them, are repugnant to the Constitution of the United States or any amendment thereof. The allegations in paragraph 28(k) of the complaint are denied, so far as they may be pertinent to any issues here.

62. Answering paragraph 29 of the complaint, defendant refers to the averments set forth in paragraphs 30 and 31 of this answer and, except as there averred and except that defendant admits that as of February 29, 1944, there was due to plaintiff from the United States and its agencies or instrumentalities for shipments made and billed a sum of money in an amount not now known by defendant, denies the allegations in said paragraph 29 of the complaint.

63. Answering paragraph 30 of the complaint, defendant refers to the averments set forth in paragraphs 30 and 31 of this answer and, except as there averred, denies the allegations in said paragraph 30 of the complaint.

64. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 of the complaint.

[fol. 43] 65. Answering the allegations in the last sentence of paragraph 32 of the complaint, defendant denies the same and refers to the averments set forth in paragraphs 30 and 31 of this answer for a true statement as to the withholding of funds from plaintiff. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph 32 of the complaint.

66. Answering the allegations in paragraph 33 of the complaint, defendant, admits that some of plaintiff's contracts, patents and patent applications are confidential, secret or restricted and are within the provisions of the various statutes and executive orders forbidding disclosure of their contents. The remaining allegations of said paragraph are conclusions of law which defendants are not required to answer; defendant nevertheless denies the same.

67. The allegations in paragraph 34 of the complaint are conclusions of law which defendant is not required to answer. Nevertheless, so far as pertinent to any issue in this proceeding, defendant denies the same and refers to paragraphs 30 and 31 of this answer for a true statement as to the collection of excessive profits due from plaintiff.

68. Except as hereinabove admitted or qualified, defendant denies each and every allegation in the complaint.

Wherefore, defendant prays for judgment dismissing the complaint, with costs and disbursements, and for such other and further relief as the Court may deem just and proper.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for Defendant.

[fol. 44] [File endorsement omitted]

[Title omitted]

APPLICATION FOR DESIGNATION OF THREE-JUDGE COURT—Filed October 10, 1944

To the Chief Justice of the United States Court of Appeals for the District of Columbia:

Plaintiff having filed in this case its complaint, seeking interlocutory and permanent injunction and a declaratory judgment to suspend and restrain enforcement of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public Law 528, 77th Congress, Second Session, 56 Stat. 226, 245, approved April 28, 1942), as amended, said Act as amended, being otherwise known as the Renegotiation Act (50 U. S. C. A., appendix 1191), on the ground that said Act is repugnant to the Constitution of the United States, application is hereby made to the Chief Justice of the United States Court of Appeals for the District of Columbia, to designate a three-judge statutory court to hear said case, as provided by the Act of August 24, 1937, c. 754, Section 3, 50 Stat. 752; 28 U. S. C. A. Section 380a.

Dated: 10/10/44.

For the Court:

Matthew F. McGuire, Justice.

Approved:

Charles Effinger Smoot, Attorney for Plaintiff.

Seen:

Francis M. Shea, Attorney for Defendants.

[fol. 45] [File endorsement omitted]

[Title omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

ORDER DESIGNATING THREE-JUDGE STATUTORY COURT—Filed October 11, 1944

Upon the request of Honorable Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia, before whom there is pending

in the above-entitled cause a complaint by the plaintiff seeking interlocutory and permanent injunction and a declaratory judgment to suspend and restrain the enforcement of an Act of Congress, on the ground that such Act is repugnant to the Constitution of the United States, and notice thereof having been duly given to the Attorney General of the United States, I hereby designate Honorable Justin Miller, Associate Justice of the United States Court of Appeals for the District of Columbia, and Honorable Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia, to participate with Honorable Matthew F. McGuire, Associate Justice of the District Court, as a three-judge statutory court to hear and determine this matter.

Dated October 11, 1944.

D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION WITH RESPECT TO DEATH OF DEFENDANT KNOX—Filed October 25, 1944

It is stipulated by the parties to this case, but solely for the purpose of this stipulation, that:

1. Defendant Frank Knox, Secretary of the Navy of the United States, died April 28, 1944.

2. Defendant James V. Forrestal was, when this action was commenced, Under Secretary and Acting Secretary of the Navy, and on May 17, 1944, became and now is, Secretary of the Navy.

3. Defendant James V. Forrestal, as Secretary of the Navy, intends, pursuant to the Renegotiation Act, unless otherwise ordered by the Court, to cause the order of March 4, 1944, to be enforced.

4. This action may be continued as an action against James V. Forrestal, and an order may be entered substitut-

[fol. 47] ing as defendant James V. Forrestal in lieu of Frank Knox and James V. Forrestal, this stipulation and such order, however, to be without prejudice to the claim of defendant Forrestal that this action is in reality one against the United States which has not consented to be sued, and without prejudice to the claim of plaintiff that it is an individual action.

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, by Charles Effinger Smoot, Attorneys for Plaintiff.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, by Francis M. Shea, Attorneys for Defendants.

[fol. 48] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR SUBSTITUTION OF PARTY DEFENDANT—Filed October 26, 1944

The Court finding from the stipulation of parties that defendant Frank Knox, Secretary of the Navy of the United States, died April 28, 1944, that defendant James V. Forrestal, who was Under Secretary and Acting Secretary of the Navy when this action was commenced, became on May 17, 1944, and now is, Secretary of the Navy, that defendant Forrestal, as Secretary of the Navy, intends, unless otherwise ordered by the Court, to cause the order of March 4, 1944, to be enforced, and that there is substantial need for continuing and maintaining this action.

It is, therefore, pursuant to Rule 25(d) of the Rules of Civil Procedure, hereby ordered that James V. Forrestal be, and he hereby is, substituted as defendant herein in lieu of defendants Frank Knox and James V. Forrestal.

This court approves the agreement of the parties that this order and its entry shall be without prejudice to the claim of defendant Forrestal that this action is in reality one against the United States which has not consented to

[fol. 49] be sued and without prejudice to the claim of plaintiff that it is an individual action.

Justin Willer, Associate Justice of the United States Court of Appeals for the District of Columbia. Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia., Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia.

Approved and consented to and service of copy of order waived.

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot; by, Charles Effinger Smoot, Attorneys for Plaintiff.

Francis M. Shea, Assistant Attorney General, Edward M. Curran, United States Attorney; by, Francis M. Shea, Attorneys for Defendants.

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO SET CASE FOR HEARING—Filed November 8, 1944

The plaintiff moves the court to set the above entitled case for a hearing and as grounds therefor state:

1. This is a suit attacking the constitutionality of an Act of Congress and under the applicable law the case should "be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day." (28 U. S. C. A. 380a.)

2. In addition there are factual elements in this situation warranting an early disposition of the case, the details of which are set forth in an affidavit of Charles Effinger Smoot in support of this motion, which affidavit is made a part hereof as though set forth in full herein.

(As pointed out in the said affidavit, plaintiff would like to have at least six weeks notice of the day for which the hearing is set.)

Stewart and Lewis, W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot; by, Charles Effinger Smoot, Attorneys for Plaintiff.

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CHARLES EFFINGER SMOOT IN SUPPORT OF MOTION TO SET CASE FOR HEARING—Filed November 8, 1944

DISTRICT OF COLUMBIA, ss:

Charles Effinger Smoot, being first duly sworn, deposes and says:

1. The complaint herein was filed March 8, 1944 and the answer filed June 12, 1944.

2. In similar cases officers of the government enforcing the renegotiation statute, which is involved in this case, have asserted the right of the government to interest on the amount of excessive profits (after allowance is made for the tax credit) at the rate of six per cent (6%) per annum and upon information and belief have in fact collected such interest in some cases. As set forth in the stipulation suspending payment and intermediate action filed in this case March 11, 1944, the net amount involved in this case is estimated at One Million Fifty Thousand Dollars ($1,050,000) after allowing the tax credit for the Four Million Nine Hundred Ninety Thousand Dollars ($4,990,000) determined as excessive profits by the defendant's unilateral [fol. 52] order of March 4, 1944. If interest is allowed in this case on the net amount involved, One Million Fifty Thousand Dollars ($1,050,000), the continuing liability of the plaintiff would aggregate about Sixty Three Thousand Dollars ($63,000) a year or Five Thousand Two Hundred Fifty Dollars ($5,250) a month.

3. Upon information and belief, plaintiff's business involved in this case aggregates over Twenty-four Million Dollars ($24,000,000), thousands of different items and many different contracts, which contracts have been entered into at various times over the period 1939-1942. Plaintiff wishes to be able to make final preparations for presenting the detailed evidence involved in this case shortly before the trial thereof. Accordingly, plaintiff would like to have six weeks notice of the day certain on which the trial will be conducted.

4. Upon information and belief, plaintiff is now being renegotiated for 1943 and undoubtedly may be renegotiated for 1944. Many of the problems involved in 1943 and 1944 renegotiations are constitutional and legal questions awaiting determination in this suit.

5. Upon information and belief, plaintiff is a Pennsylvania corporation and as such pays taxes to the State of Pennsylvania upon its profits. There is doubt whether or not plaintiff can recover or obtain a credit for taxes paid to the State of Pennsylvania on profits which may subsequently be recaptured under the Renegotiation Act. Possibly plaintiff is without any redress for this potential loss.

Charles Effinger Smoot.

Subscribed and sworn to before me this 8th day of [fol. 53] November, 1944. Anne A. Linke, Notary Public, D. C. (Seal.)

IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

1944, Nov. 20, Motion to set for hearing heard, Ruling to the effect that Govt. is to file motion to dismiss or for summary judgment by Dec. 9, 1944; Pltf. to file reply by Dec. 15, 1944; hearing on motion to dismiss or for summary judgment (if filed) set for Dec. 18, 1944, no order, Atty's. in Court (Miller J. (C. C. A.); Bailey, J.; McGuire, J.)

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE COMPLAINT AND FOR SUMMARY—Filed December 9, 1944

Now comes the defendant herein by his attorneys and moves the Court to dismiss the complaint on the grounds that:

1. The Court lacks jurisdiction over the subject matter of the action; and

2. The complaint fails to state a claim against the defendant upon which relief can be granted.

In the alternative, the defendant moves for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law.

In support of the said motions the defendant offers the verified answer previously filed in this action and his affidavit, attached hereto and submitted herewith.

Francis M. Shea, Assistant Attorney General. Edward M. Curran, United States Attorney.

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES V. FORRESTAL—Filed December 9, 1944

James V. Forrestal, being duly sworn, deposes and says:

1. I am, and have been since May 19, 1944, the duly appointed, qualified and acting Secretary of the Navy of the United States, and as such charged with the duties of administering Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Cong.) approved April 28, 1942, as amended from time to

time and as applicable to fiscal years ended prior to July 1, 1943. Between August 22, 1940 and May 19, 1944, I was the duly appointed, qualified and acting Under Secretary of the Navy of the United States, and as such was charged with the duties of administering the said Act, as amended, and as applicable to fiscal years ended prior to July 1, 1943, by direction of and delegation by the then duly appointed, qualified and acting Secretary of the Navy of the United States. With respect to the matters complained of herein by plaintiff, Mine Safety Appliances Company, I have also at all material times acted for and on behalf of the "Secretaries" of the other renegotiating agencies named in said Act under appropriate delegations of power.

2. Under date of March 4, 1944, acting in my said capacity of Under Secretary of the Navy and pursuant to the said delegated powers to act under the renegotiation Act, I made [fol. 56] a unilateral order requiring the Mine Safety Appliances Company to eliminate excessive profits for its fiscal years ended December 31, 1941 and December 31, 1942, which provided in part as follows:

> "• • • pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the extent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods."

3. Subsection (c), subdivisions (2) and (3), of the Renegotiation Act of 1942 provides that, upon such a determination of excessive profits, that is, upon "renegotiation" as defined in such Act, the Secretary is authorized and directed to eliminate the amount of excessive profits so determined, less the tax credit computed pursuant to Section 3806 of the Internal Revenue Code.

4. My said unilateral order dated March 4, 1944 also provided in part as follows:

> "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403."

5. The company failed and refused unconditionally to pay the net amount of the refund due under my said unilateral determination.

[fol. 57] 6. After the complaint herein had been served on respondents on March 8, 1944, the plaintiff's attorneys, under date of March 9, 1944, agreed and stipulated with my representative, the Attorney General of the United States, that:

> "1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:
>
> Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.
>
> up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department); for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his

written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

7. Thereafter, the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., suspended payment to plaintiff on vouchers submitted with respect to contracts performed by the plaintiff, and which were otherwise payable, in the total face amount of $1,054,258.65.

8. Under cover of a letter dated March 23, 1944, Mr. W. P. Mays, Internal Revenue Agent in Charge at Phila- [fol. 58] delphia, Pennsylvania, computed the amounts of tax credit due to Mine Safety Appliances Company under Section 3806 of the Internal Revenue Code to be $409,962.85 for the year ended December 31, 1941 and $3,525,163.37 for the year ended December 31, 1942, assuming refunds of excessive profits in the amounts of $550,000 for 1941 and $4,400,000 for 1942.

9. Investigation, and information secured from an officer of plaintiff in November, 1944, showed that plaintiff had not realized, nor was it likely to realize, any further excessive profits for its fiscal years 1941 and 1942 under the con-

tingencies specified in my unilateral order of March 4, 1944. Upon the basis of such facts, and since it was clear that no further amount of excessive profits would in the future be realized by the company under the contingencies set forth in said unilateral order, I forwarded a check in the amount of $39,384.87 to the company under cover of a letfer dated December 6, 1944. In this letter, I stated that the remainder of the payments suspended with respect to vouchers otherwise payable, in the total face amount of $1,014.873.78, would satisfy the company's obligation under my said unilateral order and pursuant to the Renegotiation Act, in the event that its suit was unsuccessful. A copy of such covering letter is attached to this affidavit as Exhibit A.

10. Since I have suspended payment of a sufficient amount of money to cover the full amount of net refund due under the Renegotiation Act, there is no possibility that at any time in the future I will or can proceed to collect, by withholding or otherwise, any further sum from plaintiff on account of excessive profits realized during its fiscal years 1941 and 1942.

11. All money used by the Navy Department to acquire supplies and materials is either appropriated to it by Con- [fol. 59] gress for specified purposes, or is appropriated to another Department or agency for certain purposes and thereafter pursuant to law, allocated to the Navy Department for expenditure for such purposes. Upon such appropriation or allocation the Treasury Department establishes upon its books a credit in favor of the Navy Department in the specified amounts which are thereafter available for the purposes stated by the Congress. The Navy Department makes further administrative allotments of such amounts for more particularized purposes and enters into contracts of purchase with vendors, thereby establishing obligations to pay out, upon proper performance, the amounts so appropriated. All such contracts with vendors are made by officers or employees of the Navy Department, as representatives of the United States.

12. In the absence of set-offs or counter-claims, and provided the contractor has validly performed the contract, payments of the invoices submitted by the vendor are approved in due course, and a disbursing officer of the Navy Department draws a check upon the Treasury of the United States to the order of the vendor. Checks issued

by the disbursing officer in payment of approved vouchers are paid by the Treasury Department out of funds advanced to the disbursing officer. After the disbursing officer's accounts have been reviewed and a transfer and counter warrant approved by the Comptroller General, the Treasury Department, on the basis of such transfer and counter warrant, debits the applicable appropriation account on the books of the Treasury and credits the account of the disbursing officer to whom the funds had previously been advanced.

13. The sum of $1,014,873.78, as to which payment has been suspended, is being held as an obligated but unexpended balance in the particular appropriation accounts [fol. 60] of the Navy Department applicable to the various contracts with the plaintiff. The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency, as explained in paragraph 11 above.

14. Pursuant to the aforesaid stipulation, such money is being so held, pending the outcome of the suit, and will continue to be carried in the proper appropriation accounts on the books of the Treasury subject to applicable statutory limitations. If the plaintiff is unsuccessful in this suit, such money will immediately be transferred, on the books of the Treasury, from the appropriations available to the Navy Department to miscellaneous receipts of the Treasury. The amount of payments suspended will satisfy the company's liability for excessive profits under the Renegotiation Act for its fiscal years 1941 and 1942.

James V. Forrestal, Secretary of the Navy.

WASHINGTON, DISTRICT OF COLUMBIA:

Subscribed and sworn to before me this 8th day of December, 1944.

J. S. Davitt, Notary Public.

My commission expires March 14, 1949.

[fol. 61] EXHIBIT "A" TO AFFIDAVIT

The Secretary of the Navy
Washington

6 December 1944.

Mine Safety Appliances Company, Pittsburgh, Pa.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

DEAR SIRS:

Under date of March 4, 1944 I issued a unilateral order under the above Act, finding and determining that your company realized excessive profits in the amounts of $550,000 for the fiscal year ended December 31, 1941 and $4,400,000 for the fiscal year ended December 31, 1942. In addition to such specified amounts, I also found and determined that your company realized as excessive profits

"• • • the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the extent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods."

My said unilateral order also provided in part that:

"Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or sub-

contractor by the Government and by contractors, within the meaning of said Section 403."

On March 8, 1944, a complaint was served in the case entitled *Mine Safety Appliances Company* v. *Frank Knox*, [fol. 62] *James V. Forrestal*, Civil Action No. 23387 (U. S. Dist. Ct., D. C.). On the following day, your counsel and Assistant Attorney General Francis M. Shea, representing me, stipulated in part as follows:

"1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

"2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1."

Thereafter, pursuant to my direction, the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., suspended payment of vouchers otherwise payable to your company by the Navy Department, on behalf of the United States of America, in the total amount of $1,054,258.65. Under cover of a letter dated March 23, 1944, Mr. W. P. Mays, Internal Revenue Agent in Charge at Philadelphia, Pennsylvania, computed the amounts of tax credit due to your company

under Section 3806 of the Internal Revenue Code to be $409,962.85 for the year ended December 31, 1941 and $3,525,163.37 for the year ended December 31, 1942, upon the basis of refunds of excessive profits in the amounts of $550,000 for 1941 and $4,400,000 for 1942. This would leave, upon the basis of a total refund of $4,950,000, a net cash refund payable by your company amounting to $1,014,873.78.

Investigation shows that your company has not realized, nor is it likely to realize, any further excessive profits for its fiscal years 1941 and 1942 under the contingencies specified in my unilateral determination dated March 4, 1944. Since the final net amount of refund due under such determination is $1,014,873.78, I am enclosing a check in the amount of $39,384.87, which represents payment of certain vouchers with respect to which payment has heretofore been suspended.

Application of the remaining suspended vouchers in the net amount of $1,014,873.78 to your indebtedness under my [fol. 63] order will satisfy in full your company's obligation under the Renegotiation Act for your fiscal years 1941 and 1942, in the event that your company is unsuccessful in the pending suit.

Yours very truly, (S.) James Forrestal.

[fol. 64] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. F. BEGGY—Filed December 15, 1944

J. F. BEGGY, being duly sworn, deposes and says:

I am, and have been since January 18, 1939 the Vice President of Mine Safety Appliances Company, plaintiff above named, and make this affidavit in its behalf and by way of answer to affidavit of Hon. James V. Forrestal.

1. I admit the averments of paragraph 1. of the affidavit of said Hon. James V. Forrestal except that I am not sufficiently informed to answer as to whether said Hon. James V. Forrestal has "at all material times acted for

and on behalf of the "Secretaries" of the other renegotiating agencies named in said Act under appropriate delegations of power".

2. I admit the allegations of paragraph 2. of said affidavit.

3. For answer to paragraph 3. of said affidavit, I refer to the provisions of the Renegotiation Act of 1942, as amended.

4. I admit the averments of paragraph 4. of said affidavit except that I deny that plaintiff was notified, "Unless action is taken by you (plaintiff) not later than March 6, 1944 * * * ", and aver that the correct date is March 8, 1944. I aver that on March 8, 1944, as will appear by reference to the records in this Court, the Complaint herein was filed to stay the effective date of defendant's threatened action.

5. I admit the averment of paragraph 5.

[fol. 65] 6. I admit the averments of paragraph 6.

7. I admit the averments of paragraph 7, except that I do not have sufficient information to enable me to answer as to whether the suspension of payments and vouchers totaling $1,054,258.65 is correct. As will appear by reference to registered letter which I addressed to Hon. James V. Forrestal on December 13, 1944, I have requested information with reference to this matter, and until I am furnished with said information, I neither admit nor deny the correctness of the action of the Certification-Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C. A true and correct copy of said letter is attached hereto and made a part hereof.

8. I have no knowledge of the letter of March 23, 1944 referred to in paragraph 8 of said affidavit, nor sufficient information as to the calculation made by the said Mr. W. P. Mays to determine whether his calculation is correct. My information is such that I believe, and therefore aver that the calculation of Mr. Mays as of March 23, 1944 could not have been other than a tentative calculation and hence could not be a final determination of the amounts of tax credit under Section 3806 of the Internal Revenue Code.

9. Inasmuch as said Hon. James V. Forrestal does not identify the person who made the investigation nor specify

the information secured from an officer of the plaintiff in November, 1944, I am unable to answer as to this portion of said affidavit. I talked with an officer of the Navy during November, 1944 and gave him certain information, but said information did not enable said Hon. James V. Forrestal to determine that plaintiff had not realized nor was likely to realize any further excessive profits for its fiscal years 1941 and 1942 as there was no discussion between me and said officer with respect to this matter. I am not sufficiently informed to answer as to whether the statement, "Upon the basis of such facts, and since it was clear that no further amount of excessive profits would in the future be realized by the company * * *" is correct. I am advised by counsel, believe and therefore aver that no answer is required of me as to the reasoning of said Hon. James V. Forrestal in arriving at the amount of the check for $39,384.67, referred to in said paragraph 9. I have returned [fol. 66] said check by letter dated December 13, 1944 and refer to said letter, which is annexed hereto, for an explanation as to my reason for believing the aforesaid amount is erroneous. As heretofore stated, I am not able to determine whether the suspended payments are correct or incorrect until I am furnished with the information referred to in my said letter of December 13, 1944.

10. I deny the averments of paragraph 10 as stated. I aver that, as will appear by reference to the stipulation of the parties referred to in paragraph 6 of the affidavit of Hon. James V. Forrestal, the suspension of payments was by agreement of the parties and not the result of sole action by the said Hon. James V. Forrestal. I am advised by counsel that as to whether there is any possibility at any time in the future said Hon. James V. Forrestal "will or can proceed to collect * * *", is purely a matter of conjecture and depends entirely upon what action the said Hon. James V. Forrestal or his successor in office may be required to take in the future pursuant to the applicable provisions of the laws of the United States.

11. I am advised by counsel, believe and therefore aver that the manner in which funds are furnished to the Navy Department to acquire supplies and materials and the manner in which said sums are expended by said Navy Department are governed by the applicable provisions of the laws of the United States and I am not required to answer as to these matters.

12. I am not sufficiently informed as to the manner in which the matters averred in paragraph 12 of the Hon. James V. Forrestal's affidavit are handled within the Navy Department or the other departments which are involved in this proceeding and hence I make no admission or denial of the averments of said paragraph.

13. I am informed that the only manner in which the sum of $1,014,873.78 referred to in paragraph 13 of the affidavit of the Hon. James V. Forrestal, or any other sum, may be withheld, is in accordance with the provisions of the stipulation between the parties hereto of March 9, 1944. I have not sufficient information to answer as to any other manner of withholding on the part of the Navy Department, but as has been heretofore stated in my affidavit, until in-
[fol. 67] formation is furnished me as to the various contracts, I am unable to answer as to whether the withholding is proper in amount. I deny the conclusion of the said Hon. James V. Forrestal that, "The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency, * * *" if by such conclusion, said Hon. James V. Forrestal intends to suggest, said funds are in the Treasury of the United States and are not presently payable to the plaintiff by virtue of the contract obligations between the United States and the plaintiff, and in this connection I aver that other departments of the Government, as will appear from the affidavit of said Hon. James V. Forrestal, paragraph 1, are involved in this proceeding.

14. I aver that the stipulation referred to in paragraph 14 speaks for itself and governs the obligations of the defendant with reference to the funds of the plaintiff therein referred to.

J. F. Beggy, Vice President.

City of Pittsburgh,
County of Allegheny,
State of Pennsylvania

Subscribed and sworn to before me this 14th day of Dec., 1944.

R. E. Malone, Notary Public. My commission expires April 7, 1947. (Seal.)

[fol. 68] Copy

Everything for Mine and Indusfrial Safety

Churchill
5900

Cable Address
"Minsaf" Pittsburgh

Mine Safety Applicances Co.

Braddock, Thomas and Meade Streets

Pittsburgh 8, Pa.

In Reply Please
Refer to

December 13, 1944

Registered Mail

Hon. James V. Forrestal
The Secretary of the Navy
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter of the 6th inst. addressed to this Company enclosing Check No. 609,587 of the Treasurer of the United States in the sum of $39,384.87, dated December 2, 1944, together with vouchers numbered D. O. 1927, 1928, 1929 and 1930.

We are herewith returning the above described check and vouchers for the reason that, as we understand the situation, your calculation is in error. You did not favor us with a copy of the letter of March 23, 1944 from Mr. W. P. Mays so that we are not in a position to determine whether Mr. Mays' calculation is final or tentative. As we understand the situation, this calculation could not have been final and hence the result as stated in your letter is, in our opinion, not final.

In order to verify the total of $1,054,258.65, we feel that we should be furnished with a list of the vouchers showing the United States contract number, Mine Safety Appliances Company invoice number and date, the number of units, and the price and total of each item making up this total, as without this information we are unable to identify the

contracts and material involved in this amount of $1,054,258.65.

Very truly yours,
Mine Safety Appliances Company, J. F. Beggy, Vice President.

JFB: brm
Encs.

Exclusive World Distributors of Edison Electric Cap Lamps

[fols. 69-100] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted]

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY, Plaintiff

vs.

FRANK KNOX, JAMES V. FORRESTAL, Defendants

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and McGuire, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

OPINION—Filed March 15, 1945

McGUIRE, J:

The plaintiff Mine Safety Appliances Company is a corporation engaged in the manufacturing, selling, exporting, and installing throughout the United States and elsewhere, mining and industrial equipment and protective apparatus for the protection of life and property.

For several years past the company, both as a prime contractor and as a sub-contractor has secured so-called war contracts, presumably subject to the provisions of the Renegotiation Act, 50 U. S. C. A. Appendix § 1191.

On March 4, 1944, the defendant Forrestal as Under Secretary of the Navy, acting under authority of the Act made

a unilateral order requiring the company to eliminate excessive profits for its fiscal years ending December 31, 1941, and December 31, 1942. The order provided in part as follows: "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits * * * by directing the withholding of amounts otherwise due to you as a contractor * * *. [fol. 101] The plaintiff company failed and refused to comply with the order and on March 8, 1944, filed the complaint herein which prayed for an injunction to restrain the defendant from:

"(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by methods of enforcement sought to be provided by said Renegotiation Act, or by any other method."

The complaint further prayed that a special court of three judges be constituted and that upon final hearing the court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against the plaintiff.

After the complaint had been served the parties entered into a stipulation as follows: "Defendants will cause the Navy Department to suspend payment, pending final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to

the plaintiff * * * up to the sum of $1,050,000 (subject t adjustment upon further calculation by the Navy Department) for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears [fol. 102] from his written determination of March 4, 1944 * * * Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

(2) In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular no action to enforce the terms of said determination of March 4, 1944 * * *.

(3) Plaintiffs will not apply to the court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort * * *

(4) By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

Thereafter the Navy Department suspended payment to the plaintiff on vouchers submitted with respect to contracts performed by *the company*, and which were otherwise payable, in the amount of $1,014,873.78 which sum is being held as an obligated but unexpended balance in the particular appropriation account of the Navy Department applicable to the various accounts of the plaintiff. The practical effect of this is that the total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by any other department or agency.

The statutory court of three judges having been convened as prayed for the defendant moved to dismiss the complaint on jurisdictional grounds and our determination herein is upon that motion.

[fol. 103] Immediately *in limine* we are confronted with the initial and controlling inquiry as to whether this is in fact a suit against the United States.

If it is, or if their interests are substantially affected, then the suit fails for it is basic law that the sovereign cannot be sued without its consent.

U. S. ex rel. Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191.

This prohibition rests upon sound and cogent reasons of public policy, and is embedded deeply in the common law.

The United States cannot be subjected to legal proceedings of any character without their consent; and whoever institutes such proceedings *must* bring his case within the authority of some act of Congress.

United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001;
Lynch v. U. S., 292 U. S. 571, 78 L. Ed., 1434, 54 S. Ct. 840;
The Siren, 7 Wall. 152, 19 L. Ed. 129.

Again it has been held and now is settled definitely that if the United States is not a formal party defendant—if their interests are so *directly* involved that they are actually the real party in interest, and any relief or judgment that might be granted or entered will operate against them,—they are by nature of this fact an indispensable party and the suit as a consequence must fail, for you cannot do by indirection what you are forbidden to do directly.

Morrison v. Work, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394;
Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755;
International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134;
Belknap v. Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599;
In re Ayers, 123 U. S. 443, 502, 8 S. Ct. 164, 181, 31 L. Ed. 216.

[fol. 104] It is equally well established that if an indispensable party is not joined the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068;
Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411.

Is this suit here, therefore, in essence one against the defendant Forrestal, or is he actually only the nominal party and the interests to be directly affected by granting of the relief prayed for, those of the United States?

If they are, then the courts have no jurisdiction, unless by the authority of Congress they have been accorded such.

The question is most certainly, not a new one, but the line of demarcation is not easily drawn, and its repeated litigation has not served the purpose of clarification any too well.

Early in our law Chief Justice Marshall laid down the doctrine that the question as to whether a suit is against the sovereign ((State)—and as a consequence within the prohibition of the Eleventh Amendment)—is to be determined by the nominal parties of record.

Osborn v. Bank of United States, 9 Wheat, 738, 857, 6 L. Ed. 204.

If that were the law today it would be determinative of the matter here. But while that case is still the law of the land in other respects, it is now finally settled the courts will look behind the designation of parties on the record and seek to determine who are the *real* parties to the litigation.

New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656;
Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. Ed. 954;
In re Ayers, *supra;*
Ford Motor Company v. Department of Treasury (Sup. Ct. of U. S. # 75 Oct. Term 1944, decided January 8, 1945), 89 L. Ed. 372, 376.

[fol. 105] And it makes no difference whether it is contended a State or the United States is or is not involved, the principle, in essence, is the same.

In litigation involving this principle two classes of cases have arisen.

Pennoyer v. McConnaughy, 140 U. S. 1, 8, 9, 10, 11 S. Ct. 699, 35 L. Ed. 363.

The *first*, in which the action is brought against the officers of the sovereign representing *its* action and *liability*, thus making *it* though not a party of record, the real party

against whom the judgment sought will function and operate so as to compel *it* to perform *its* contract, or respond to *its* other obligations.

In re Ayers, *supra*;

Hagood v. Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. Ed. 805;

Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448.

The *second*, in which there is an invasion of a LEGAL right, either on the part of the Government, or an officer of it, acting either under color of an unconstitutional statute, or in excess of the power validly conferred by a constitutional one.

It is to be noted however, that the right invaded must be a LEGAL one "• • • one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege • • • •"

Tennessee Power Co. v. T. V. A., 306 U. S. 118, 137, 138, 59 S. Ct. 366, 83 L. Ed. 543.

What is the right sought to be enforced here?

It certainly is not one of property; the complainant has no right to *the monies* appropriated by Congress for the Navy Department.

There most certainly is no *tortious* invasion of any *right* of the complainant by the defendant Forrestal, nor is there any right arising out of any privilege conferred by statute. [fol. 106] And if, *arguendo*, it is urged that the complainant's case is bottomed on a right arising out of contract—what is the nature of the relief sought?

Stripped of all legal verbiage, and reduced to its simplest terms, it is sought to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay.[1]

---

[1] Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act un-

The defendant Forrestal has no personal interest in the matter and no official authority to grant the relief asked. We conclude therefore, that the United States is the real party in interest, for against it only would a decree be operative, and the suit thus being in substance one against the sovereign, this court has no jurisdiction.

[fol. 107] The United States and they alone are to be affected by the relief here sought. The suit therefore in substance is one against the United States;

In re Ayers, *supra.*

and can be distinguished from those cases in which a definite right of the complainant has been invaded by the act of the officer in question.

Where the action in fact is one for the recovery of money from the sovereign, the latter "• • • is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit, even though individual officials are nominal defendants."

Ford Motor Co. v. Dept. of Treasury, *supra.*

The cases cited by the complainant in support of its theory that the United States is not a necessary party, can all be distinguished, in that they either are not apposite or fall within the second category referred to above.

Tennessee Power Co. v. T. V. A., *supra.*

---

der their direction, enjoining and restraining them until the further order of the Court, from

(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof

• • • • • • •

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

• • • • • • •

Again, *a fortiori*, "* * * the right to proceed against an individual, even though an officer, to prevent a violation of the Constitution did not include the right to *disregard* (italics supplied) the Constitution by awarding relief which could not rightfully be granted without *impleading* (italics supplied) the United States * * *."

Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, 40, 38 S. Ct. 271, 62 L. Ed. 560.

The United States is a necessary party here for the decree sought would compel the payment of money out of the Treasury of the United States [2]; or compel the sovereign to perform specifically its contract.[3] For if the plaintiff were to prevail the defendant Forrestal would be compelled to pay money out of the Treasury, the decree thus [fol. 108] in effect compelling specific performance on the part of the Government of *its contract*. Thus, the United States is a necessary party, and the suit is as a consequence, one against the United States and one over which this court has no jurisdiction.

We are not unmindful of the decision of a similar statutory court in this jurisdiction in Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308. It is to be noted however, in that case that the court said "* * * the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here * * *." And there is no claim here that the defendant Forrestal (Knox) has the right to interfere with the contractual relationship existing between the complainant and its customers.

The present case can be distinguished further from the Lincoln case supra, in that, as has been indicated, the relief here sought would compel the payment of money out of the Treasury, which of course demands as a prerequisite that the United States be made a formal party.

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[2] Haskins Bros. & Co. v. Morgenthau, 66 App. D. C. 178, 181, 85 F. 2 677, 680, *cert. denied*, 299 U. S. 588; Cummings v. Hardee, 70 App. D. C. 18, 21, 102 F. 2 622, 625.

[3] United States, ex rel., Shoshone Irr. Dist. v. Ickes, 63 App. D. C. 167, 169, 70 F. 2 771, 773, and cases cited.

Disposing thus as we must, and have, of the jurisdictional question *in limine* raised, relative to the others we express perforce no opinion.

Motion to dismiss granted. Counsel will prepare proper order.

(Signed.) Matthew F. McGuire.

I concur.

(Signed.) Justin Miller.

3/15/45.

[fol. 109] CONCURRING OPINION

BAILEY, J.:

Inasmuch as the defendant has filed an affidavit stating that he has suspended payment of a sufficient amount of money to cover the full amount of net refund due under the Renegotiation Act and that there is no possibility that at any time in the future he will or can proceed to collect, by withholding or otherwise, any further sum from plaintiff on account of excess profits realized during its fiscal years 1941 and 1942, the right of the defendant to prevent or endeavor to prevent any prime contractor or subcontractor of the plaintiff from paying any sums due to the plaintiff is not involved in this suit.

Apart from this question, the action is one in which the United States is a necessary party and I concur in the opinion that this Court is without jurisdiction for that reason.

(Signed) Jennings Bailey.

I concur.

(Signed) Justin Miller.

I concur.

(Signed) Matthew F. McGuire.

3/15/45

[File endorsement omitted.]

[fol. 110] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF DISMISSAL—Filed April 9, 1945

This cause having come on to be heard before a three judge statutory court on December 18, 1944 upon the motion of defendant Forrestal to dismiss and/or for summary judgment, and counsel for defendant having been heard in support of said motion, and counsel for plaintiff having been heard in opposition thereto;

Now upon said motion, upon the affidavit of James V. Forrestal, sworn to December 8, 1944, heretofore filed in support of said motion, upon the affidavit of J. F. Beggy, sworn to December 14, 1944, heretofore filed in opposition to said motion, and upon the complaint and answer heretofore filed, due deliberation having been had thereon, it is

Ordered that the complaint be and it hereby is dismissed on the grounds set forth in the opinions filed herein March 15, 1945.

Justin Miller, Associate Justice, U. S. Court of Appeals for the District of Columbia. Jennings Bailey, Associate Justice, U. S. District Court for the District of Columbia. Matthew F. McGuire, Associate Justice, U. S. District Court for the District of Columbia.

Approved as to form:

Charles Effinger Smoot, Attorney for Plaintiff.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for Defendant.

Dated: April 9, 1945.

[fol. 111] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL FROM DISTRICT COURT TO SUPREME COURT—Filed May 1, 1945.

The plaintiff, Mine Safety Appliances Company, by its attorneys below named, feeling itself aggrieved by the order of the court entered herein on the ninth day of April, 1945, for the reasons set forth in its assignment of errors which is filed herewith, hereby prays an appeal from such order, to the Supreme Court of the United States; and further prays that citation be issued as provided by law; that an order be entered fixing the amount of bond and security to be given by the plaintiff as appellant and conditioned as the law directs and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Mine Safety Appliances Company, by W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, Attorneys for Plaintiff, 912 American Security Building, Washington, D. C.

Served a copy of the within above petition on James V. Forrestal by serving Commdr. H. C. Johnson, T. A. G. office personally 5-3-45.

C. Michael Kearney, U. S. Marshal in and for the District of Columbia, by T. R. East, Deputy U. S. Marshal. OR.

[fol. 112] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1945

Mine Safety Appliances Company, appellant herein, assigns as error, in support of its appeal herein, the following:

1. The Court below erred in entering its order dismissing the complaint in the above-entitled cause.

2. The Court erred in dismissing the complaint without determining the questions of the constitutionality of the statute involved in this cause (the Renegotiation Act) and/or whether the defendant herein had exceeded his statutory authority.

3. The Court erred in taking into consideration the answer of defendant in determining defendant's motion to dismiss.

4. The Court erred in taking into consideration the affidavits in determining the motion to dismiss.

5. The Court erred in taking into consideration on the motion to dismiss any facts other than those alleged in the complaint.

6. The Court erred in passing upon the question of the United States being an indispensable party to the action, said question being one of defense and therefore not properly raised by a motion to dismiss.

Personally served copy of the within assignment of errors on James V. Forrestal, by serving Commdr. H. C. Johnson, T. A. G. office 5-3-45.

C. Michael Kearney, U. S. Marshal in and for the D. of C., by T. R. East, Deputy U. S. Marshal. OR.

[fol. 113] 7. The Court erred in not holding the Renegotiation Act to be in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes appointed executive or administrative officers to take appellant's property without paying just compensation thereof.

8. The Court erred in not holding the Renegotiation Act to be in violation of the Fifth Amendment to the Constitution of the United States in that it enables appointed executive officers to repudiate valid existing contracts of plaintiff with the United States and thereby to take appellant's property without due process of law.

9. The Court erred in not holding that the Renegotiation Act violates Article I Section 1, Article I Section 8, Clause 18 and Article III Section 1 of the Constitution of the United States in that it delegates legislative and judicial functions to appointed executive officers without standards.

10. The Court erred in not holding that the Renegotiation Act in effect illegally delegates to appointed executive of-

ficers the power of levying such taxes as in their unrestricted opinions should be imposed and upon such groups of citizens as in their unrestricted opinions should pay such taxes.

11. The Court erred in not holding the Renegotiation Act to be unconstitutional as lacking procedural due process.

12. The Court erred in failing to hold the Renegotiation Act to be unconstitutional as applied to the facts of this case.

13. The Court erred in not holding that the facts alleged in the complaint disclosed that the actions of defendant and his subordinates were arbitrary and discriminatory and lacked procedural due process and were therefore unconstitutional.

[fol. 114] 14. The Court erred in holding there was no property right in plaintiff in its valid contracts with the United States and the right to be paid therefor in accordance with their agreed terms.

15. The Court erred in holding that there was no tortious invasion of plaintiff's property rights by the acts of defendant in excess of his lawful authority.

16. The Court erred in holding that the relief sought by plaintiff was that of specific performance of its contracts with the United States, or performance of obligations of the United States.

Wherefore the plaintiff, Mine Safety Appliances Company, prays that the order of the District Court of the United States for the District of Columbia appealed from herein, be reversed.

Mine Safety Appliances Company, by W. Denning Stewart, 1017 Park Building, Pittsburgh, Pennsylvania; Howard Zacharias, 1103 Law and Fiance Building, Pittsburgh, Pennsylvania; Charles Effinger Smoot, 912 American Security Building, Washington, D. C., Its Attorneys.

[fols. 115-124] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 1, 1945

It appearing to the court that the plaintiff, Mine Safety Appliances Company, has filed its petition for appeal to the Supreme Court of the United States, and has filed therewith its assignment of errors, and also its statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the order in question,

It is ordered that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the order rendered in this cause on the ninth day of April, 1945; and it is

Further ordered that the clerk of the said court shall prepare and certify a transcript of the record, proceedings, and order in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in the said court within 30 days of this date; and it is

Further ordered that plaintiff give a bond with good and sufficient security in the sum of two hundred and fifty Dollars ($250.00), that it as appellant shall prosecute its appeal to effect, and answer all costs if it fails to make its appeal good.

Dated, May 1st, 1945.

Jennings Bailey, Justice.

Personally served copy of the within order on James V. Forrestal by serving Commdr. A. C. Johnson, J. A. G. Office 5-3-45. C. Michael Kearney, U. S. Marshal in and for the D. of C.

By T. R. East Deputy U. S. Marshal O. R.

[fol. 125] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS INTENDED TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 26, 1945

The appellant in the above-entitled case states that the points upon which it intends to rely in this court in this case are as follows:

1. The Court below erred in entering its order dismissing the complaint in the above-entitled cause.

2. The Court below erred in dismissing the complaint without determining the constitutionality of the statute involved in this case—the Renegotiation Act of April 28, 1942 as amended.

3. The Court below erred in failing to hold the aforesaid Renegotiation Act unconstitutional.

a. The aforesaid Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes appointed executive or administrative officers to take appellant's property without paying just compensation therefor.

b. The aforesaid Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States [fol. 126] in that it enables appointed executive officers to repudiate valid existing contracts of appellant with the United States and others and thereby takes appellant's property without due process of law.

c. The aforesaid Renegotiation Act violates Article I Section 1, Article I Section 8, Clause 18 and Article III Section 1 of the Constitution of the United States in that it delegates legislative and judicial functions to appointed executive officers without standards.

d. Insofar as the aforesaid Renegotiation Act delegates to appointed executive officers the right of summary seizure of property of appellant, it violates Article III, Section 1, of the Constitution of the United States in that it delegates judicial functions and is in violation of the Fifth Amendment in that it authorizes the seizure of the property of appellant without first having afforded appellant due process of law.

e. The aforesaid Renegotiation Act in effect delegates to appointed executive officers the power of levying such taxes as in their unrestricted opinions should be imposed and upon such groups of citizens as in their unrestricted opinions should pay such taxes, contrary to Article I Section 1, Article I Section 8, Clause 1, and the Sixteenth Amendment to the Constitution of the United States.

f. The aforesaid Renegotiation Act is unconstitutional as lacking procedural due process, there being no provisions for a hearing or findings of fact.

4. The Court erred in failing to hold the aforesaid Renegotiation Act to be unconstitutional as applied to the facts of this case.

5. The Court below erred in dismissing the complaint without determining whether the appellee herein had exceeded his lawful authority.

[fol. 127] 6. The Court below erred in not holding that the facts alleged in the complaint disclosed that the actions of appellee and his subordinates were arbitrary and discriminatory and lacked procedural due process and were therefore unconstitutional.

7. The Court below erred in taking into consideration on the appellee's motion to dismiss:

a. Any facts other than those alleged in the complaint.

b. The answer.

c. Affidavits.

8. The Court below when considering the appellee's motion to dismiss, erred in passing upon the question of the United States being an indispensable party to the action, said question being one of defense and therefore not properly raised by a motion to dismiss.

9. The Court below erred in holding that it was without jurisdiction of this case.

10. The Court below erred in holding that the United States was an indispensable or necessary party to this suit.

11. The Court erred in holding that the relief sought by appellant was that of specific performance of its contracts

with the United States, or performance of obligations of the United States.

12. The Court erred in holding, in effect, that there was no property right in appellant in its valid contracts with the United States and the right to be paid therefor in accordance with their agreed terms.

13. The Court erred in holding that there was no tortious invasion of appellant's property rights by the acts of appellee in excess of his lawful authority.

14. The Court erred in holding that the case involves the right to monies in the Treasury of the United States.

[fol. 128] 15. The Court below erred in holding that the relief sought or, on the facts in this case, the relief to which the appellant may be entitled would affect the substantial interests of the United States.

16. The Court below erred in holding that there is no possibility that this suit will involve any amounts other than those represented by vouchers on which payment has been suspended.

17. The Court below erred in holding that this suit does not involve appellant's right to prevent the appellee from instructing appellant's customers to withhold amounts otherwise due appellant.

The appellant further states that only the following parts of the record as filed in this court need be printed by the clerk for the hearing of the case:

Title of Paper	Record Pages
Complaint	1–18
Stipulation Suspending Payment and Intermediate Action	19–20
Answer	25–43
Application for Designation of Three-Judge Court	44
Order Designating Three-Judge Statutory Court	45
Stipulation with Respect to Death of Frank Knox	46–47
Order for Substitution of Party	48
Motion to Set Case for Hearing	50
Affidavit of Charles Effinger Smoot	51–53
Copy of docket (or minute) entry of November 20, 1944	53

W. Denning Stewart, Howard Zacharias, Charles Effinger Smoot, Counsel for Appellant.

Receipt is hereby acknowledged this 26 day of May, 1945, of a copy of the above statement and designation of the record.

Hugh B. Cox, Acting Solicitor General of the United States, Counsel for Appellee.

[fol. 129½] [File endorsement omitted]

[fol. 130] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURSDICTION, ETC.—June 11, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. Counsel are requested to discuss in their briefs and on oral argument the questions whether this is a suit against the United States and whether the complaint states a cause of action in equity. The Court does not desire to hear argument upon any other question not passed upon by the District Court. Counsel will be free to discuss in their briefs and upon oral argument the failure of

appellant to proceed before the Tax Court as provided in section 403 (e) of the Renegotiation Act of 1942 as amended, 50 U. S. C. app., Supp. IV, sec. 1191 (e).

Endorsed on cover: File No. 49716. District Court of the United States for the District of Columbia. Term No. 71. Mine Safety Appliances Company, Appellant, vs. James V. Forrestal, Secretary of the Navy. Filed May 12, 1945. Term No. 71, O. T. 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

W. DENNING STEWART,
HOWARD ZACHARIAS,
CHARLES EFFINGER SMOOT,
Counsel for Appellant.

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Subject Index

Table of Cases Cited

STATUTES CITED

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY,
Plaintiff,

vs.

JAMES V. FORRESTAL,
Defendant.

STATEMENT AS TO JURISDICTION

The basis upon which it is respectfully contended that there is jurisdiction on appeal in the Supreme Court of the United States to review the order entered in the District Court of the United States for the District of Columbia on April 9, 1945, is as follows:

I

Jurisdiction of the Supreme Court

The statute believed to sustain the jurisdiction of the Court is the Act of Congress of August 24, 1937, 28 U. S. C. 380(a), 50 Stat. 751, Section 3. Jurisdiction was so recognized by this Court in *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508 (1941); *Coffman* v. *Breeze Corporation*, No. 71, October Term, 1944, 89 L. ed. Advance Opinions 255 and by analogy, *Sterling* v. *Constantin*, 287 U. S. 378 (1932) and *Herkness* v. *Irion*, 278 U. S. 92 (1928).

II

The Court Below Had Jurisdiction

That the Court below had jurisdiction as a Court of Equity is sustained by *Stark* v. *Wickard*, 321 U. S. 288

(1944). That the Court below had jurisdiction to determine whether the defendant was liable under the facts is sustained by *Illinois Central R. Co. v. Adams*, 180 U. S. 28 (1901); *Brewery Co.* v. *Moore*, 262 F. 582 (D. C. Mo.) (1919). The lower court had jurisdiction of the declaratory judgment feature: *Curtin* v. *Wallace*, 306 U. S. 1 (1939).

III

Statutes Involved In This Proceeding

The statutes of the United States, the validity of which are involved, are:

Section 403 of the Act of April 28, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191), said statute is now known as the 1942 Renegotiation Act; and

Section 403 (a)(4)(C); (a)(4)(D); (e); (i)(1)(D); (i)-(1)(F) and (i)(3) as amended by Section 701 (b) of the Act of February 25, 1944 (58 Stat. 78-92), now known as the 1943 Renegotiation Act. (Note: The 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—is now printed in the United States Code Annotated, but the "1943" Act is not pertinent to this case except for the sub-sections indicated above.)

The material provisions of the statutes are set forth in the Appendix infra pp. 22-30.

IV

Date of Decree and Application for Appeal

The order of the aforesaid District Court granting the defendant's motion and dismissing the plaintiff's complaint was signed, filed and docketed under date of April 9,

1945, and the application for appeal herein is presented April 27, 1945.

V

Nature of the Case

This case was heard below by a Three-Judge Court constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. 380(a), the principal questions raised by the complaint itself and as applied to this case being the constitutionality of the Renegotiation Statute, hereinbefore mentioned and whether defendant had exceeded his statutory authority and was therefore acting illegally.

Under protest the appellant-plaintiff herein submitted to the procedure required by the Renegotiation Act with the result that on March 4, 1944, the defendant herein, purporting to act by delegation of authority to him, on behalf of the various other governmental departments (War, Treasury and Maritime Commission) interested in contracts with appellant-plaintiff, notified it in writing as follows:

"The Under Secretary of the Navy

Washington

March 4, 1944

Mine Safety Appliances Company
Pittsburgh
Pennsylvania

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

Gentlemen:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act,

1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941, and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of,

Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours,

(S.) JAMES FORRESTAL."

In order to prevent defendant from inflicting irreparable injury on it through the carrying out of his unilateral order and his threat to direct the withholding of amounts otherwise due appellant-plaintiff by the Government as contractor or subcontractor and by appellant-plaintiff's contractors, and to prevent defendant from interfering with the business relations between appellant-plaintiff and its customers, and to avoid a multiplicity of suits which would necessarily arise if its subcontractors refused to pay, appellant-plaintiff filed its complaint in the Court below on March 8, 1944, praying for a preliminary injunction to be made permanent on final hearing and for a declaratory judgment.

The complaint alleged facts establishing the unconstitutionality of the statute in question and further alleged facts which established that defendant was acting in excess of his

statutory authority in that he had included in renegotiable business of appellant-plaintiff, contracts which had been entered into, completed, and paid for, prior to the date of the statute and its amendments and which, by its express language, were not subject thereto. Only contracts not paid for in full prior to April 28, 1942 are subject to the statute (Sec. 403(c)(6).

The contracts here involved were in material part, entered into in 1941 and 1942, prior to April 28, 1942, the date of the statute, and the amendments of October 21, 1942 and July 14, 1943.

It is believed that "otherwise due" in the statute means that these amounts would be paid except for the unilateral order here involved.

The grounds upon which unconstitutionality of the statute rests are, inter alia,

(a) The statute vests in appointed executive and administrative officials authority to repudiate prior existing contracts between appellant-plaintiff and the United States and others and to pay for property acquired from appellant-plaintiff under such contracts, such prices therefor as in the opinion of these executive or administrative officers should be paid, the position of appellant-plaintiff being that since the Fifth Amendment guarantees payment of just compensation such a statute is a violation thereof.

(b) The statute authorizes by its retroactive provision, and the complaint alleges, the repudiation of prior valid existing contracts between appellant-plaintiff and the United States, in violation of the Fifth Amendment.

(c) The statute delegates to appointed executive and administrative officials and permits them in turn to redelegate ad infinitum unrestricted legislative and judicial functions without standards of any nature and therefore violates

Article I, Section 1, Article I, Section 8, Clause 18, and Article III, Section 1, of the Constitution of the United States.

(d) The statute in legal effect delegates to appointed executive and administrative officials the authority to impose a super excess profits tax on such persons as in their unrestrained opinions should pay such tax and in such amounts as in their unrestrained opinions should be paid.

(e) The statute undertakes to vest in biased executive agencies with whom appellant-plaintiff made its contracts, the right to repudiate those contracts and fix a price for appellant-plaintiff's property, which action violates the "due process" clause of the Fifth Amendment of the Constitution of the United States in that it makes it impossible for appellant-plaintiff to receive a fair hearing or the rudimentary right of fair play from an independent and impartial administrative agency.

(f) The statute undertakes to discriminate, without any reasonable basis therefor, against excessive profits from contracts with certain government agencies and authorizes the granting of such exemptions therefrom as the defendant and the appointed Boards, in their opinion, may see fit.

(g) The statute lacks due process and is unconstitutional from a procedural standpoint.

(h) The statute is by its terms, arbitrary and discriminatory.

The complaint further alleged that the statute was unconstitutionally applied on the basis of the following facts as averred in the complaint:

(i) In arriving at his unilateral order of March 4, 1944, facts were considered by defendant which were obtained from "governmental or other reliable sources" and appel-

lant-plaintiff was never apprised of these facts although request was made for such information.

(j) No facts were found to support the unilateral order and in fact, appellant-plaintiff was refused information as to how the defendant and his board arrived at their conclusions.

On March 9, 1944, after the complaint had been served, the parties to the litigation entered into the following stipulation, in lieu of a preliminary injunction:

"Stipulation Suspending Payment and Intermediate Action

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

up to the sum of $1,000,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take

no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemd to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

MILLS AND KILPATRICK,
By (S.) CHARLES EFFINGER SMOOT,
(S.) W. DENNING STEWART,
Counsel for Plaintiff.
(S.) FRANCIS M. SHEA,
Asst. Atty. Gen.,
Counsel for Defendants.
3/9/44."

On June 12, 1944, the defendant filed his answer asserting legal and factual defenses, raising several issues of fact.

On December 8, 1944, defendant filed a motion to dismiss and for summary judgment and an affidavit in support thereof. The substance of the affidavit is that since defendant says he need not look any further than the vouchers on which payment has been suspended, he neither will nor can proceed to collect, by witholding or otherwise, any further sum from plaintiff on account of excessive profits realized during its fiscal years, 1941 and 1942. Plaintiff filed an answering affidavit denying certain of the averments of defendant's affidavit.

The court below (Justices Miller, Bailey and McGuire), upon consideration of the complaint, answer, and affidavits, without passing upon the constitutional issue or whether

defendant was acting in excess of his statutory authority, sustained one ground asserted in defendant's Motion to Dismiss, namely, that the Court lacked jurisdiction over the subject matter, the Court holding that the United States was the real party in interest because the effect of an injunction would be to require payment to appellant-plaintiff of the amounts due it on its contracts with the United States. Two opinions were filed. Appendix pp. 30-39. Mr. Justice Miller concurred in the opinion of Mr. Justice McGuire. Mr. Justice Bailey filed a separate opinion in which the other two Justices concurred.

VI

Substantial Nature of Questions Involved

As was well stated by the Circuit Court of Appeals for the Second Circuit in *Hoffman Brewing Company* v. *M'Elligott*, 259 F. 525, 527 (1919):

> "A Suit in equity to enjoin the United St es attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. In such a case the United States is sued as effectively as if it were a defendant by name. There is however, a well-recognized exception to the rule, viz. if property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States atttorney. When instituting criminal proceedings under it he is to be regarded not as representing the United States in his official capacity, but as acting individually. So if, under a valid statute, he threatens to proceed in a manner injurious to complainant's property rights, and not authorized by statute, he transcends his authority, does not represent the United States, is not protected by the statute, and may be enjoined. Irreparable injury alone is not enough. Both these conditions must exist. Obviously in such

cases the constitutionality of the statute, or the question whether the United States attorney has transcended his authority, must be determined by the court before it can determine whether the particular suit is or is not against the United States."

To the same effect are—

State of Oklahoma ex rel Phillips v. *Atkinson Co.*, 37 Ged. Supp. 93 Aff. 313 U. S. 508 (1941);

Obrecht-Lynch Corp. v. *Clark*, (D. C. Md.) 30 F. (2d) 144, 146 (1929);

Franklin Township v. *Tugwell* (App. D. C.) 85 F. (2d) 208, 229 (1936);

Hammond-Knowlton v. *United States* (C. C. A. 2d) 121 F. (2d) 192; Cert denied 314 U. S. 694 (1941).

This sound principle of law is ignored by the Court below and its opinion, we believe, obviously begs the real question at issue.

If the statute be unconstitutional or the defendant is acting in excess of his statutory authority then he had no official status and cannot claim the immunity of the sovereign. It is of no moment that defendant has no personal interest in the suit. No affirmative action is asked for against the defendant or any other person. The relief prayed for is that defendant only be prohibited from doing what he has no legal right to do. Such relief is a proper subject for equity. *Ex parte Young*, 209 U. S. 123, 160 (1908); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Perkins* v. *Elg*, 307 U. S. 325 (1939); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944).

The law as announced by the lower Court is directly contrary to *United States* v. *Lee*, 106 U. S. 196; 16 Otto 171, at p. 220 (1882):

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, nor

that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his propery. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of citizen, and even his life, against the assertion of unlawful authority on the part of the executive and legislative branches of the Government. See Ex parte Milligan, 4 Wall., 2 (71 U. S., XVIII., 281), and the case of Kilbourn, discharged from the custody of the Sergeant-at-Arms of the House of Representatives by Chief Justice Cartter, Kilbourn v. Thompson, 103 U. S. 168 (XXVI., 377).

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

"It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established not only to decide upon the controverted rights of the citizens as

against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

If the lower Court's decision is to stand then a citizen of the United States is without any protection against a threatened illegal seizure of his property or invasion of his property rights by a government official acting under an unconstitutional statute or in excess of his statutory authority, if by chance the property be valid existing contracts and an indebtedness otherwise due him thereon from the United States.

This Court and the Circuit Courts of Appeals have ruled to the contrary in the following cases:

Osborn v. *Bank*, 9 Wheat. 738 (1824).
De Lima v. *Bidwell*, 182 U. S. 1 (1901).
Philadelphia Co. v. *Stimpson*, 223 U. S. 605 (1912).
Smith v. *Jackson*, 246 U. S. 388 (1918), 241 Fed. 747.
Sage v. *United States*, 250 U. S. 33 (1919).
Goltra v. *Weeks*, 271 U. S. 536 (1926).
Miguel v. *McCarl*, 291 U. S. 442 (1934).

Fox v. *Standard Oil Co.*, 294 U. S. 87 (1935).
Ickes v. *Fox*, 300 U. S. 82 (1937).
Worcester County Trust Co. v. *Riley*, 302 U. S. 292 (1937).
Brookes v. *Dewar*, 313 U. S. 354 (1941).
United States v. *Kales*, 314 U. S. 186 (1941).
Magruder v. *Association* (C. C. A. 8th), 219 F. 72 (1914).
McCarl v. *Cox* (App. D. C.) 8 F. (2d) 669; Cert. denied, 270 U. S. 652 (1925).
McCarl v. *Pence* (App. D. C.) 18 F. (2d) 809 (1927).
R. F. & P. R. Co. v. *McCarl* (App. D. C.) 62 F. (2d) 203; Cert. denied 288 U. S. 615 (1932).
Noce v. *Morgan Co.* (C. C. A. 8th) 106 F. (2d) 746 (1939).
Berger v. *Ohlson* (C. C. A. 9th) 120 F. (2d) 56 (1941).
Hammond-Knowlton v. *United States* (C. C. A. 2d) 121 F. (2d) 192; Cert. denied 314 U. S. 694 (1941).

The foregoing concedes arguendo the fact situation as assumed by the lower Court which is not correct, because when the complaint was filed the defendant threatened, as well, to seize amounts otherwise due from appellant-plaintiff's customers, and his subsequent shift of position does not defeat the then existing jurisdiction *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936) especially since this shift appears to be a plain violation of the stipulation of March 9, 1944, between the litigants. (Quoted in full at page 8 herein.)

It is respectfully urged that it is essential that defendant be enjoined from carrying out his unilateral order and from taking appellant-plaintiff's property, i. e. amounts otherwise due it from the United States or from its customers Statute Sec. 403 (c) (2), because once the defendant recovers the amounts otherwise due appellant-plaintiff,

he is required under the Renegotiation Act (403 (c)(2)(v)), to turn such amounts over to the Treasury Department as miscellaneous receipts. If this occurs, appellant-plaintiff is without a remedy because in that situation, it cannot sue the United States, and there is no provision in the statute for a refund. In this situation equity is the proper remedy. *Ohio Oil Co.* v. *Conway,* 279 U. S. 813 (1929); *Fox* v. *Standard Oil Co.,* 294 U. S. 87 (1935); *Gully* v. *Interstate Natural Gas Co.* (C. C. A. 5th) 82 F. (2d) 145; Cert. denied 298 U. S. 688 (1936); *Anniston Manufacturing Co.* v. *Davis,* (C. C. A. 5th) 87 F. (2d) 773, 779; Aff. 301 U. S. 337 (1937). In addition, interest is not recoverable—28 U. S. C. 284, *United States* v. *Goltra,* 312 U. S. 203, 207 (1941)—which establishes irreparable injury.

Educational Films Corporation of America v. *Ward,* 282 U. S. 379, 386 (footnote 2) (1931); *Hopkins* v. *Southern California Telephone Company,* 275 U. S. 393 (1928); *Proctor & Gamble Distributing Co.* v. *Sherman,* 2 F. (2d) 165, 166 (1924); *Nutt* v. *Ellerle,* 56 F. (2d) 1058, 1062 (1932). Compare *State of California* v. *Latimer,* 305 U. S. 255, 261 (1938).

The lower Court states "• • • strippeed of all its legal verbiage, and reduced to its simplest terms, it is sought to force the United States through Forrestal in his official capacity—as its officer—to perform its promise to pay". This theory is not only contrary to the facts as a casual examination of the complaint will disclose, but is also, we believe, fundamentally fallacious. This theory presupposes that the United States has refused to pay the appellant-plaintiff for goods heretofore sold and delivered to it, which is not the case, and we doubt whether anyone will seriously urge such an unmoral contention. We think it safe to assert that it is to be presumed that the United States will meet its valid obligations and certainly it is not to be presumed that the United States having hereto-

fore agreed by written contract to pay for goods sold and delivered to it will now refuse to pay. The amounts otherwise due appellant-plaintiff from the United States which the Renegotiation statute (Section 403 (c) (v)) authorizes the defendant to withhold, are not amounts which have arisen from the contracts which have been renegotiated because in this case the contracts renegotiated have been paid for long since, as this was business completed in 1941 and 1942. The amounts otherwise due arise from goods sold and delivered to the United States in 1943 and 1944, prior to the date of the defendant's unilateral order of March 4, 1944 and except for that order, so far as this record discloses, these amount would have been paid to appellant-plaintiff. In addition, we call attention to the fact that as to the contracts for the material sold and delivered, there is an express assent to be sued for these goods in the Act of March 3, 1887 as amended (28 U. S. C. A. §250).

It is also believed that the statutory provision authorizing the defendant to withhold amounts otherwise due appellant-plaintiff from the United States and appellant-plaintiff's customers is unconstitutional: *Williams* v. *United States,* 289 U. S. 553, 578 (1933); *Hines* v. *United States* (App. D. C.) 105 F. (2d) 85, 89 (1939) and *McCarl* v. *Cox,* 8 F. (2d) 669 (1925); Cert. Denied 270 U. S. 652.

These questions are present in the case at bar and are surely of grave public importance.

It is also believed that in considering any facts outside those set up in the complaint, which had to be assumed to be true (*Mosher* v. *Phoenix,* 287 U. S. 29 (1932); *Ickes* v. *Fox,* 300 U. S. 82 (1937); *Columbia Broadcasting Co.* v. *United States,* 316 U. S. 407, 414 (1942)) the Court below has acted contrary to the rulings of this Court in *Polk Company* v. *Glover,* 305 U. S. 5 (1938); *Utah Fuel Co.* v. *National Bituminous Coal Com.,* 306 U. S. 56 (1939)

and *Gibbs* v. *Buck*, 307 U. S. 66 (1939), and contrary to *Cooper* v. *O'Connor* (App. D. C. 107 F. (2d) 207 (1939); Cert. denied 308 U. S. 615; *McConville* v. *District of Columbia* (D. C. Dist. of Col.) 26 Fed. Supp. 295 (1938) and *Cohen* v. *United States* (C. C. A. 8th) 129 F. (2d) 733 (1942).

It is believed that in taking into consideration the ex parte action of defendant, a condition which arose after the filing of the complaint in determining the jurisdictional question, the Court below has acted contrary to the rulings of this Court in *Busch* v. *Jones*, 184 U. S. 598 (1902); *Camp* v. *Boyd*, 229 U. S. 530 (1913); *Dawson* v. *Distilleries & Warehouse Co.*, 255 U. S. 288 (1921); *Minneapolis R. R.* v. *Peoria R. R.*, 270 U. S. 580 (1926), and *Consolidation Coal Co.* v. *Railway Co.*, 44 F. (2d) 595 (D. C. Md.) (1930) especially since the alleged unconstitutional and unauthorized acts of the defendant have been responsible for the condition arising subsequent to the filing of the complaint—*Jones* v. *Securities and Exchange Commission, supra, Texas, etc.* v. *Northside, etc.*, 276 U. S. 475 (1928).

It is believed that in ignoring the allegations of the complaint that defendant had included in renegotiable contracts those not within the statutory provisions; the Court below has acted contrary to the ruling of this Court in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498; (1932) and cases cited supra.

It is submitted that the complaint shows beyond successful dispute that the statute here in question authorizes and the defendant has, pursuant thereto, repudiated valid existing contracts between appellant-plaintiff and the United States, and has fixed such prices for appellant-plaintiff's material previously sold as he or his subordinates, in their opinions, saw fit, and that such action is contrary to numerous decisions of this Court holding that just compensation is a judicial question and Congress

cannot, directly or indirectly, through the delegation of such power to executive officers, determine just compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893); *United States* v. *New River Collieries Co.*, 262 U. S. 341 (1923); *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931); *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349 (1936).

It is also believed that in its retroactive provisions and the defendant's action pursuant thereto, the statute here involved is unconstitutional under the ruling of this Court in *Chicago & Northwestern Rwy. Co.* v. *United States*, 104 U. S. 680 (1882); *Lynch* v. *United States*, 292 U. S. 571 (1934); *United States* v. *Bethlehem Shipbuilding Corp.*, 315 U. S. 289 (1942). It was conceded during the hearings in Congress on the statute that the retroactive features were of doubtful constitutionality. Congressional Record, 77th Congress, of April 7, 1942, vol. 88, pages 3480-3481, 3498, and 3503; April 23, 1942, vol. 88, page 3763; Congressional Record, 78th Congress, First Session, vol. 89, pp. 10247-10253; Hearings before House Committee on Naval Affairs, 78th Congress, First Session, pursuant to H. Res. 30, vol. 2, pages 518 and 1165; Senate Finance Committee Hearings on H. R. 3687, 78th Congress, First Session, page 1006; Senate Hearings on H. R. 6868 by a Subcommittee of the Committee on Appropriations, 77th Congress, Second Session, pages 28, 87-88; Senate Finance Committee Hearings on Sec. 403 of Public Law No. 528, 77th Congress, Second Session, Part I, page 37.

It is also believed that, as the statute delegates legislative and judicial functions to appointed executive and administrative officials without any standards to guide them, the statute is contrary to *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corporation* v.

United States, 295 U. S. 495 (1935); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) and *Yakus* v. *United States*, 321 U. S. 414 (1944).

If it be regarded as a super-excess profits tax statute, then the statute is plainly contrary to the Constitutional requirement that Congress shall levy taxes.

This Court in *Alma Motor Co.* v. *Timken Detroit Axle Co.*, No. 806, October Term, 1944, granted certiorari. The United States did not oppose the granting of the writ because the question of the constitutionality of the Royalty Adjustment Act of 1942 was of considerable importance.

It is also believed the case at bar discloses grounds for a declaratory judgment: *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933); *Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937); *Currin* v. *Wallace*, 306 U. S. 1 (1939) and *Delno* v. *Market St. Rwy. Co.*, 124 F. (2d) 965 (C. C. A. 9th) (1942).

There are some thirty-five other cases pending in various courts (other than the Tax Court of the United States) in regard to the Renegotiation Act (Hearings before the House Committee on Ways and Means, Seventy-ninth Congress, First Session, on H. R. 2628, April 12, 1945 (unrevised) page 82). Many, if not all, of those cases involve one or more of the problems presented in this case. The decision in this case is in conflict with the decision of another three-judge statutory court in a suit by a contractor also attacking the validity of the Renegotiation Act (Lincoln Electric Company vs. Frank Knox and James V. Forrestal, Civil Action No. 21,866 in the District Court of the United States for the District of Columbia). A copy of the opinion in the Lincoln case is attached hereto as Appendix D, appendix pages 39-44.

The appellant-plaintiff appends hereto a copy of the opinions of the District Court delivered, signed, filed, and

docketed herein under date of March 15, 1945 (Appendices B and C ,appendix pages 30-38 and 38-39).

Respectfully submitted,

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1017 Park Building,
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Mine Safety Appliances Company.

Filed May 1, 1945. Charles E. Stewart, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

MINE SAFETY APPLIANCES COMPANY,
Plaintiff,

v.

JAMES V. FORRESTAL,
Defendant.

STATEMENT AS TO JURISDICTION

Appendices

APPENDIX A

The 1942 Renegotiation Act as Amended

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or * * *

(omitted portions refer to so-called "war brokers")

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000, hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the

Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i) made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct; and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the sub-

contractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in

the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) * * *

(Omitted portion refers to recognition of deductions, credits, etc.)

(4) * * *

(Omitted portion refers to agreements.)

(5) * * *

(Omitted portion relates to filing of information; time for commencement of renegotiations, etc.)

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractors.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) * * *

(Omitted portion provides for Secretary obtaining information.)

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as

as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

(i) (1) the provisions of this section shall not apply to—

* * *

(Omitted portion provides for exemptions.)

(j) * * *

(Omitted portion provides exemptions to permit intermittent and temporary employees to prosecute claims against the United States.)

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

(Section 403 of the Act of April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191.) Note: The Acts approved October 21, 1942, and July 14, 1943, specifically provide that the amendments made to section 403 by those Acts shall be effective as of April 28, 1942, the date of the approval of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.)

The 1943 Renegotiation Act

Sec. 403(a) (4) (C) and (D)

* * * * * * *

(Omitted portions relate to allowances of costs and rebates.)

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other

witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under apragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403 (i) (1) (C), (D), and (F).

* * * * * * * *

(Omitted portions relate to exemptions.)

Sec. 403 (i) (3).

* * * * * * * *

(Omitted portions relate to natural resources and increments in the value of excess inventories.)

Sec. 403 (1). This section may be cited as the "Renegotiation Act."

(Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended by Section 701 (b) of the Act of February 25, 1944 (58 Stat. 78-92) and which according to subsection (d) of said section 701 shall be "effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment"—April 28, 1942. This so-called 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—may be found in Title 50 of the United States Code Annotated Appendix, Section 1191, 1944 cumulative annual Pocket Part.)

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23,387

Filed Mar. 15, 1945. Charles E. Stewart, Clerk

MINE SAFETY APPLIANCES COMPANY, Plaintiff,

vs.

FRANK KNOX, JAMES V. FORRESTAL, Defendants

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and McGuire, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court

McGUIRE, J.:

The plaintiff Mine Safety Appliance Company is a corporation engaged in the manufacturing, selling, exporting and

installing throughout the United States and elsewhere, mining and industrial equipment and protective apparatus for the protection of life and property.

For several years past the company, both as a prime contractor and as a sub-contractor has secured so-called war contracts, presumably subject to the provisions of the Renegotiation Act. 50 U. S. C. A. Appendix §1191.

On March 4, 1944, the defendant Forrestal as Under Secretary of the Navy, acting under authority of the Act made a unilateral order requiring the company to eliminate excessive profits for its fiscal years ending December 31, 1941, and December 31, 1942. The order provided in part as follows: "Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits * * * by directing the withholding of amounts otherwise due to you as a contractor * * *."

The plaintiff company failed and refused to comply with the order and on March 8, 1944, filed the complaint herein which prayed for an injunction to restrain the defendant from:

"(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof;

(2) Instructing or requesting any prime contractor or subcontractor or officer, employee or agent thereof, to withhold any monies due or to become due to plaintiff from such prime contractor;

(3) From further proceeding in any manner to renegotiate or refix contract prices with respect to materials and supplies furnished or to be furnished by plaintiff;

(4) From proceeding in any manner directly or indirectly, to enforce or attempt to enforce the determination and order of March 4, 1944, whether by

methods of enforcement sought to be provided by said Renegotiation Act, or by any other method."

The complaint further prayed that a special court of three judges be constituted and that upon final hearing the court order, adjudge and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against the plaintiff.

After the complaint had been served the parties entered into a stipulation as follows: "Defendants will cause the Navy Department to suspend payment, pending final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to the plaintiff * * * up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department) for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944 * * * Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

(2) In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular no action to enforce the terms of said determination of March 4, 1944 * * *.

(3) Plaintiffs will not apply to the court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort * * *.

(4) By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights."

Thereafter the Navy Department suspended payment to the plaintiff on vouchers submitted with respect to contracts

performed by *the company*, and which were otherwise payable, in the amount of $1,014,873.78 which sum is being held as an obligated but unexpended balance in the particular appropriation account of the Navy Department applicable to the various accounts of the plaintiff. The practical effect of this is that the total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by any other department or agency.

The statutory court of three judges having been convened as prayed for the defendant moved to dismiss the complaint on jurisdictional grounds and our determination herein is upon that motion.

Immediately *in limine* we are confronted with the initial and controlling inquiry as to whether this is in fact a suit against the United States.

If it is, or if their interests are substantially affected, then the suit fails for it is basic law that the sovereign cannot be sued without its consent.

U. S. ex rel. Goldberg v. Daniels, 231 U. S. 218, 34 S. Ct. 84, 58 L. Ed. 191.

This prohibition rests upon sound and cogent reasons of public policy, and is embedded deeply in the common law.

The United States cannot be subjected to legal proceedings of any character without their consent; and whoever institutes such proceedings *must* bring his case within the authority of some act of Congress.

United States v. Clarke, 8 Pet. 436, 8 L. Ed. 1001.
Lynch v. U. S., 292 U. S. 571, 78 L. Ed. 1434, 54 S. Ct. 840.
The Siren, 7 Wall, 152, 19 L. Ed. 129.

Again it has been held and now is settled definitely that if the United States is not a formal party defendant—if their interests are so *directly* involved that they are actually the real party in interest and any relief or judgment that might be granted or entered will operate against them,—they are by nature of this fact an indispensable party and the suit as a consequence must fail, for you cannot do by indirection what you are forbidden to do directly.

Morrison v. Work, 266 U. S. 481, 45 S. Ct. 149, 69 L. Ed. 394

Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755

International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134

Belknap v. Schild, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599

In re Ayers, 123 U. S. 443, 502, 8 S. Ct. 164, 181, 31 L. Ed. 216.

It is equally well established that if an indispensable party is not joined the suit will be dismissed.

Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068

Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. Ed. 411

Is this suit here, therefore, in essence one against the defendant Forrestal, or is he actually only the nominal party and the interests to be directly affected by granting of the relief prayed for, those of the United States?

If they are, then the courts have no jurisdiction, unless by the authority of Congress they have been accorded such.

The question is most certainly, not a new one, but the line of demarcation is not easily drawn, and its repeated litigation has not served the purpose of clarification any too well.

Early in our law Chief Justice Marshall laid down the doctrine that the question as to whether a suit is against the sovereign ((State)—and as a consequence within the prohibition of the Eleventh Amendment)—is to be determined by the nominal parties of record.

Osborn v. Bank of United States, 9 Wheat, 738, 857, 6 L. Ed. 204

If that were the law today it would be determinative of the matter here. But while that case is still the law of the land in other respects, it is now finally settled the courts will look behind the designation of parties on the record and seek to determine who are the *real* parties to the litigation.

New Hampshire v. Louisiana and New York v. Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656

Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 46 L. Ed. 954

In re Ayers *supra*

Ford Motor Company v. Department of Treasury (Sup. Ct. of U. S. #75 Oct. Term 1944, decided January 8, 1945) 89 L. Ed. 372, 376.

And it makes no difference whether it is contended a State or the United States is or is not involved, the principle, in essence, is the same.

In litigation involving this principle two classes of cases have arisen.

Pennoyer v. McConnaughy, 140 U. S. 1, 8, 9, 10, 11 S. Ct. 699, 35 L. Ed. 363.

The *first*, in which the action is brought against the officers of the sovereign representing *its* action and *liability*, thus making *it* though not a party of record, the real party against whom the judgment sought will function and operate so as to compel *it* to perform *its* contract, or respond to *its* other obligations.

In re Ayers, *supra*

Hagood v. Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. Ed. 805

Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448

The *second*, in which there is an invasion of a *legal* right, either on the part of the Government, or an officer of it, acting either under color of an unconstitutional statute, or in excess of the power validly conferred by a constitutional one.

It is to be noted however, that the right invaded must be a *legal* one "* * * one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege * * *."

Tennessee Power Co. v. T. V. A., 306 U. S. 118, 137, 138, 59 S. Ct. 366, 83 L. Ed. 543.

What is the right sought to be enforced here?

It certainly is not one of property; the complainant has no right to *the monies* appropriated by Congress for the Navy Department.

There most certainly is no *tortious* invasion of any *right* of the complainant by the defendant Forrestal, nor is there any right arising out of any privilege conferred by statute.

And if, *arguendo*, it is urged that the complainant's case is bottomed on a right arising out of contract—what is the nature of the relief sought?

Stripped of all legal verbiage, and reduced to its simplest terms, it is sought to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay.[1]

The defendant Forrestal has no personal interest in the matter and no official authority to grant the relief asked. We conclude therefore, that the United States is the real party in interest, for against it only would a decree be operative, and the suit thus being in substance one against the sovereign, this court has no jurisdiction.

The United States and they alone are to be affected by the relief here sought. The suit therefore in substance is one against the United States,

---

[1] Wherefore plaintiff prays:

(a) That this Honorable Court issue forthwith its temporary restraining order against defendants and each of them, their agents, assistants, deputies and employees, and all persons acting or assuming to act under their direction, enjoining and restraining them until the further order of the Court, from

(1) Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent of the United States to withhold any monies due, or to become due to plaintiff from the United States or any agency or instrumentality thereof

* * * * * * *

(c) That such restraining order be continued in force as an interlocutory injunction until final hearing and determination of this cause;

(d) That upon final hearing of this cause the interlocutory injunction herein prayed for be made permanent;

* * * * * * *

In re Ayers, *supra*

nd can be distinguished from those cases in which a defi-
ite right of the complainant has been invaded by the act
f the officer in question.

Where the action in fact is one for the recovery of money
rom the sovereign, the latter "* * * is the real, sub-
tantial party in interest and is entitled to invoke its sov-
reign immunity from suit, even though individual officials
re nominal defendants."

Ford Motor Co. v. Dept. of Treasury *supra.*

The cases cited by the complainant in support of its
heory that the United States is not a necessary party,
an all be distinguished, in that they either are not apposite
r fall within the second category referred to above.

Tennessee Power Co. v. T. V. A. supra

Again, a fortiori, "* * * the right to proceed against
ndividual, even though an officer, to prevent a violation
f the Constitution did not include the right to *disregard*
italics supplied) the Constitution by awarding relief which
ould not rightfully be granted without *impleading* (italics
upplied) the United States * * *."

Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, 40,
38 S. Ct. 271, 62 L. Ed. 560.

The United States is a necessary party here for the decree
ought would compel the payment of money out of the
reasury of the United States[2]; or compel the sovereign
o perform specifically its contract.[3] For if the plaintiff
ere to prevail the defendant Forrestal would be compelled
o pay money out of the Treasury, the decree thus in effect
ompelling specific performance on the part of the Govern-
ent of *its contract*. Thus, the United States is a necessary
arty, and the suit is as a consequence, one against the

[2] Haskins Bros. & Co. v. Morgenthau, 66 App. D. C. 178, 181, 85 F[2]
7, 680, *cert. denied* 299 U. S. 588; Cummings v. Hardee, 70 App. D. C.
, 21, 102 F[2] 622, 625.

[3] United States ex rel. Shoshone Irr. Dist. v. Ickes, 63 App. D. C. 167,
9, 70 F[2] 771, 773, and cases cited.

United States and one over which this court has no jurisdiction.

We are not unmindful of the decision of a similar statutory court in this jurisdiction in Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308. It is to be noted however, in that case that the court said "* * * the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here * * *." And there is no claim here that the defendant Forrestal (Knox) has the right to interfere with the contractual relationship existing between the complainant and its customers.

The present case can be distinguished further from the Lincoln case supra, in that, as has been indicated, the relief here sought would compel the payment of money out of the Treasury, which of course demands as a prerequisite that the United States be made a formal party.

Disposing thus as we must, and have, of the jurisdictional question *in limine* raised, relative to the others we express perforce no opinion.

Motion to dismiss granted. Counsel will prepare proper order.

(Signed) MATTHEW F. McGUIRE.
I concur (Signed) JUSTIN MILLER.
3/15/45.

APPENDIX C

[Stamp:] Filed May 1, 1945. Charles E. Stewart, Clerk.

C. A. 23387

Mine Safety Appliances Company

v.

James V. Forrestal

BAILEY, J.:

Inasmuch as the defendant has filed an affidavit stating that he has suspended payment of a sufficient amount of money to cover the full amount of net refund due under

ne Renegotiation Act and that there is no possibility that t any time in the future he will or can proceed to collect, y withholding or otherwise, any further sum from plain- iff on amount of excess profits realized during its fiscal ears 1941 and 1942, the right of the defendant to prevent r endeavor to prevent any prime contractor or subcon- ractor of the plaintiff from paying any sums due to the laintiff is not involved in this suit.

Apart from this question, the action is one in which the nited States is a necessary party and I concur in the pinion that this Court is without jurisdiction for that eason.

(Signed) JENNINGS BAILEY.
I concur (Signed) JUSTIN MILLER.
I concur (Signed) MATTHEW F. MCGUIRE.
3/15/45.

APPENDIX D

Copy

Stamp:] Filed May 1, 1945. Charles E. Stewart, Clerk

N THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

(Holding a Three-Judge Statutory Court)

Civil Action No. 21,886

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX, JAMES V. FORRESTAL, *Defendants*

Decided July —, 1944

Before Groner, Circuit Judge, and Bailey and Goldsborough, District Judges

Memorandum Opinion

The case is now before us on a motion by defendants for ummary judgment. The complaint of Lincoln Electric ompany against Secretary Knox and Under-Secretary

Forrestal was filed in this Court November 3, 1943. The main purpose was to obtain a decree that the Renegotiation Act in its form prior to the amendments of February 25, 1944, is unconstitutional and unenforceable. Defendants answered January 20, 1944, denying unconstitutionality and setting up various other defenses. Subsequently the present motion was filed, in which the position of the defendants, shortly stated, is that the Court lacks jurisdiction because the suit is in legal effect against the United States, which have not consented to be sued, and that the plaintiff has available to it adequate legal and administrative remedies.

Plaintiff is engaged in the manufacture and sale of electric equipment. The greater portion of its business is with customers scattered throughout the United States. The portion directly with the Departments of the United States is said to be less than 8% of the whole. The period here involved is the year ending December 31, 1942. Acting under the Renegotiation statute,[4] defendants called on plaintiff for certain information in relation to its operations and sales for the year in question, and as a result of the examination of the data furnished, determined that plaintiff had realized "excessive" profits of more than $3,000,000, and notified it that unless action were taken prior to November 5, 1943, in making proper restitution, defendants would direct the withholding of amounts due plaintiff by the Government and would likewise direct the withholding by plaintiff's customers of so much as might be due to plaintiff by them.

Defendants subsequently—that is to say, in January, 1944, long after the suit was filed—withdrew their threat to seize funds due plaintiff by its customers, and thereafter relied for restitution upon the seizure of sums due by the United States. But as to this plaintiff says that its rights to relief accrued as of the facts existing when the suit was brought and that the subsequent modification of the threat will not avail, since defendants may again change their minds, as

[4] Act, Apr. 28, 1942, C. 247, Title IV, § 403, 56 Stat. 245, 50 U. S. C. A. App. § 1191.

ey have the right to do under the appropriate act. This rings us, then, for present purposes, to consider (1), hether the suit is necessarily against the United States, nd if it is not, (2), whether Congress has otherwise pro-ided an adequate remedy in the amendment of 1944, au-horizing redetermination in a proceeding in the Tax Court.

We are not unmindful of the difficulty of stating an exact ormula for determining when a suit against an officer is a uit the United States. (*Brooks* v. *Dewar*, 313 U. S. 354, 59). But where the relief asked is that the officer be re-trained from acting to enforce an unconstitutional law in uch a way as to injure the property rights of the plaintiff, he proceeding is one against the officer. The single excep-on is the situation in which the United States, because of he nature of the decree to be issued, are indispensable arties to the suit. If, for example, the object is to com-el specific performance of a contract between the United tates and the plaintiff, or to compel an officer to pay money ut of the Treasury or otherwise to hand over to the plain-ff property which the United States claim to own, or to revent the United States from using property which they wn, or claim to own,—in all these cases the United States re the real parties in interest and the suit must fail. But he effect of an injunction in this case would not be to com-el specific performance of a Government contract or pay-ent of money out of the Treasury. The injunction would mply prevent a Government official from acting under n unconstitutional statute (if it should be found to be uch), so as to interfere with valid contract relations be-ween Lincoln and its customers. Whether the contracts ill eventually be performed, and whether the money will e paid to Lincoln, depends upon many other circumstances hich are not involved in the present action, and the right f the United States to withhold money owing to Lincoln unaffected by anything which is asked for here.

If this is a correct statement of the case we have, then would seem to follow that the suit is not against the nited States and the doctrine announced in *Ex parte oung*, 209 U. S. 123, would be controlling. At page 159 he Supreme Court said:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

And see *U. S.* v. *Lee*, 106 U. S. 196; *Phila Co.* v. *Stimson* (1912), 223 U. S. 605; *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. (2d) 478; *Ickes* v. *Fox* (1937), 300 U. S. 82; *Tenn. Electric Power Co.* v. *Tenn. Valley Authority* (1939), 306 U. S. 118; *Lane* v. *Watts* (1914), 234 U. S. 525, 540; *Goltra* v. *Weeks* (1926), 271 U. S. 536; *Franklin Township* v. *Tugwell* (1936), 66 App. D. C. 42, 85 F. (2d) 208.

Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson* v. *Ky. Dis. & W. Co.*, 255 U. S. 288. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who necessarily would have to be sued separately and where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. The controversy, as we have mentioned briefly, grows out of an Act of Congress designed to protect the United States against losses

hrough improvident contracts made by officers of the Gov-rnment in the war effort. Plaintiff insists that this legis-ation, as applied to the facts of this case, is unconstitu-ional, in that it is repugnant to Article I, Section 1, and Article I, Section 8, of the Constitution, and likewise re-ugnant to the Fifth and Tenth Amendments to the Con-titution; that in the year in question all contracts made y it for the sale and disposition of its products were made pon the basis of fixed and staple prices, as to which there ere no increases as the result of the war, and that in ccepting orders from its customers, the same were taken pon an express agreement that there should be no re-djustment or renegotiation of prices. Plaintiff further harges that if the Secretary is permitted to renegotiate ts contract, not only with the United States, but with its arious customers, who in turn have contracted with the nited States, the result would be to seriously impair its inancial structure and would otherwise irreparably injure ts capacity to cooperate successfully.

Defendants insist that, notwithstanding this and grant-ng also that the Act of Congress is unconstitutional, plain-iff has no other recourse than to challenge the claimed ight of the Government in the Tax Court or in the Court f Claims.

We think this is not sufficient. In our opinion the case hould be tried on the merits and plaintiff given the oppor-unity of proving its case, and the question of the consti-utionality of the Act of Congress should be briefed and rgued. The rule for summary judgment was, in our opin-on, never intended to throw upon the court the burden of etermining a case involving, on the one hand, a delicate uestion of law and, on the other, complicated and con-roverted facts, without an adequate and proper hearing. f the Renegotiation Act is in all respects valid, obviously, laintiff has no case. If, on the other hand, it is invalid, nd the Government, as we have indicated, is not an essen-ial party, then, clearly, plaintiff ought not to be stopped t the threshold of the court and told to seek relief in some ther court and in some other manner obviously inadequate nd incomplete.

There is another pending case in this court involving this identical question, which is set for hearing October 2, 1944. The instant case is accordingly set down for hearing on Monday, October 9th, 1944, at 10:30 o'clock A. M., on the merits and the motion for summary judgment is denied, and an appropriate order will be entered accordingly.

(Signed) D. Lawrence Groner.
(Signed) Jennings Bailey.
(Signed) T. Alan Goldsborough.

(8445)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

W. DENNING STEWART,
MAHLON E. LEWIS,
HOWARD ZACHARIAS,
CHARLES EFFINGER SMOOT,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLANT

Opinion of the Court Below

The opinion of the Court below is reported in 59 Federal Supplement 733 and appears in the record at R. 54-62.

Jurisdictional Grounds

The statute authorizing appeal to this Court, in the case at bar, is the Act of Congress of August 24, 1937, 28 U. S. C. 380(a), 50 Stat. 751, Section 3. Jurisdiction was so recog-

nized by this Court in *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Company*, 313 U. S. 508 (1941); *Coffman* v. *Breeze Corporation*, 323 U. S. 325 (1945), and by analogy in *Sterling* v. *Constantin*, 287 U. S. 378 (1932) and *Hérkness* v. *Irion*, 278 U. S. 92 (1928).

The Order of Dismissal in the Court below was entered April 9, 1945 (R. 63). Application for appeal was filed May 1, 1945 (R. 64) and allowed the same day (R. 67). The case was docketed in this Court May 12, 1945 (R. 72).

The Statute Involved

The statute of the United States, the application of which is here involved is Section 403 of the Act of April 28, 1942, as amended October 21, 1942, July 1, 1943, and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Title 50, Appendix 1191), said statute is now known as the 1942 Renegotiation Act; and Section 403(a)(4)(C); (a)(4)(D); (e); (i)(1)(C); (i)(1)(D); (i)(1)(F) and (i)(3) as amended by Section 701(b) of the Act of February 25, 1944 (58 Stat. 78-92), now known as the 1943 Renegotiation Act. (Note: The 1943 Renegotiation Act—without the so-called 1942 Renegotiation Act—is now printed in the United States Code Annotated, but the "1943" Act is not pertinent to this case except for the subsections indicated above.) The material provisions of the statutes are set forth in the Appendix *infra*, pp. 39-47.

For the convenience of the Court, we present an outline of the material provisions of the statute.

This statute, originally enacted April 28, 1942, has several times been amended. As originally enacted, 56 Stat. 226, 245, Section 403(a) the statute was made applicable only to contracts and subcontracts of the War and Navy Depart-

ments and the Maritime Commission. Other agencies have been added by subsequent amendments, but the scheme of the statute with respect to renegotiation remains essentially the same.

The terms "renegotiate" and "Renegotiation" are defined by Subsection 403(a) of the statute as including—

> "the refixing by the Secretary of the Department of the contract price."

Here, appellee purported to act under Subsection (c) of the statute, which in part provided originally:

> "The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor."

The statute was expressly made applicable (Subsection (c)):

> "to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act."

The power so given to the Secretary, the statute provided (Subsection (f)):

> "* * * may be delegated, in whole or in part, by him to such individuals or agencies in such Departments as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

The statute was amended October 21, 1942, 56 Stat. 798, 982, Section 801 within the period here in controversy, so as to add the Treasury Department to the renegotiating agencies. The other amendments made then so far as here material, all of which were declared to be retroactively "effective as of April 28, 1942", are:

1. The statute for the first time undertook to define "excessive profits", but in legal effect added nothing to the statute because it merely said "'excessive profits' means * * * excessive profits." The language is:

> "'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." (Subsection 403(a)(4).)

2. The statute for the first time attempted a definition of a subcontract. The original Act mentioned, but did not in any way disclose what was to be embraced within subcontracts. The October 1942 amendment defined "subcontract" to mean:

> "any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property." (Subsection 403(a)(5).)

3. The statute authorized the Secretary "when the contractor or subcontractor holds two or more contracts or subcontracts," to:

> "renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract." (Subsection 403(c)(1).)

4. The statute authorized the Secretary to make his determination effective by, among other methods:

> "directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract,"

or by any combination of the several methods mentioned in the statute.

The statute was amended a second time on July 1, 1943, 57 Stat. 347, 348. The only change made was to add to the Renegotiation Act, contracts and subcontracts of:

> Defense Plant Corporation
> Metals Reserve Company
> Defense Supplies Corporation
> Rubber Reserve Company

The third amendment was made July 14, 1943, 57 Stat. 564. It merely added to the contracts subject to renegotiation, the so-called war brokers' contracts "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *." This amendment is of no moment here.

The fourth amendment is that made by the Revenue Act of 1943, which became effective February 25, 1944, 58 Stat. 78-92.

The only portion of the 1944 amendments which it will be necessary to consider in this case is Section 403 (e), which undertakes to provide for redetermination in the Tax Court of an asserted renegotiation liability. Subsection 403(e)(2) provides that one:

> "aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943 [that is to say, prior to February 25, 1944], with respect to a fiscal year ending before July 1, 1943,"

"may" file a petition with the Tax Court "for a redetermination thereof." This privilege is subject to the provisions of Section 403 (e)(1) including the following:

> "Upon such filing, such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits, received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The Court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board."

Statement

The case at bar is a suit against appellee individually and not in his official capacity (R. 1), and was heard below by a Three-Judge Court (Justices Miller, Bailey and McGuire) constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. 380(a) (R. 35), the principal questions raised by the complaint (R. 1-17) being the unconstitutionality of the 1942 Renegotiation Statute hereinbefore mentioned from both a substantive and procedural standpoint, the illegality of the unilateral order, and

whether appellee had exceeded his statutory authority, and was therefore acting illegally. The complaint alleged facts entitling appellant to injunctive and declaratory judgment relief. Complainant's business for the fiscal years 1941 and 1942 was the subject of appellee's unilateral order (R. 6) and contracts entered into in the years 1940, 1941 and 1942 are here involved (R. 9).

Under protest (Complaint, paragraph 26; R. 11), appellant submitted to the procedure required by the Renegotiation Act with the result that on March 4, 1944, the appellee, purporting to act by delegation of authority to him, on behalf of the various other governmental departments (War, Treasury and Maritime Commission) interested in contracts with appellant (R. 2) notified it in writing as follows (R. 5-6):

"The Under Secretary of the Navy
Washington

March 4, 1944

Mine Safety Appliances Company, Pittsburgh, Pennsylvania.

Subject: Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, for the fiscal years ended December 31, 1941 and December 31, 1942.

GENTLEMEN:

Renegotiation with respect to your contracts and subcontracts within the meaning of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, has been conducted between you and the Secretary of the Navy or his duly authorized representative or representatives. In connection with such renegotiation there were submitted by

you or obtained from governmental or other reliable sources certain financial, operating and other data relating to your circumstances and operations and to the profits realized by you during your fiscal years ending December 31, 1941 and December 31, 1942, under such contracts and subcontracts. You have been afforded full opportunity, at hearings of which due notice was given and which you attended, to submit such additional information and to present such contentions as you deemed material to a determination whether any, and if so, what part, of such profits is excessive.

Due consideration has been given to all of such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all applicable factors pertinent to a determination of the existence and amount of excessive profits realized by you under such contracts and subcontracts for such periods. Such renegotiation has now been concluded and you have declined to enter into an agreement for the elimination of excessive profits realized during such periods from such contracts and subcontracts.

Accordingly, pursuant to authority under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, duly delegated to me under subsection (f) of said Section 403, I hereby find and determine that, after allowance as costs of the portion of all expenses reported by Mine Safety Appliances Company for such periods, allocable to such contracts and subcontracts, excessive profits in the amount of $550,000 for the fiscal year ended December 31, 1941, and $4,400,000 for the fiscal year ended December 31, 1942, were realized by Mine Safety Appliances Company during such fiscal years from such contracts and subcontracts, plus the amount of any refund or credit received by, or reduction in liability of, Mine Safety Appliances Company for (a) state or other taxes (exclusive of Federal taxes) measured by income, or (b) royalties, license fees, commissions or other charges or costs, reported as an

expense by Mine Safety Appliances Company for such periods, to the intent that such refund, credit or reduction in liability shall result from the elimination of said amounts of excessive profits from gross sales and from income of Mine Safety Appliances Company for such periods.

Unless action is taken by you not later than March 8, 1944, to eliminate said excessive profits in a manner satisfactory to me, appropriate action will be taken by me, without further notice to you, to eliminate said amount of excessive profits (after allowance thereagainst of the tax credit provided by Section 3806 of the Internal Revenue Code) by directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors, within the meaning of said Section 403.

Very truly yours, (S.) James Forrestal."

Appellant refused to submit to appellee's unilateral order and in order to prevent him from inflicting irreparable injury on it through the carrying out of his alleged illegal unilateral order and his threat to direct the withholding of amounts otherwise due appellant by the United States as contractor or subcontractor (which, under Subsection 403(2)(v) of the statute, he is required to turn into the Treasury), (Complaint paragraphs 30-34, R. 14-15), and as well due it from appellant's numerous contractors throughout the United States and to prevent appellee from injuriously interfering with the business relations between appellant and its numerous customers, and to avoid a multiplicity of suits throughout the United States which would necessarily be required if its subcontractors refused to pay, appellant averring that it was without a plain, adequate and complete remedy at law (Complaint paragraph 34, R. 14) filed its complaint (R. 1-17) in the Court below on March 8, 1944, praying for a preliminary injunction to be made permanent on final hearing and for a declaratory judgment (R. 16-17).

The complaint alleged facts establishing the unconstitutionality of the statute in question (R. 5-6, 8-15), and further alleged legal grounds establishing the unconstitutionality of said statute and the invalidity of appellee's unilateral order (R. 11-13). See footnote. Appellant further alleged facts (R. 9-10) which established that appellee was acting in excess of his statutory authority in that he had included in renegotiable business of appellant, contracts which had been entered into, completed, and paid for, prior to the date of the statute and its amendments and which, by its express language, were not subject thereto. Contracts paid for in full prior to April 28, 1942, are not subject to the statute (Sec. 403 (c) (6)).

The contracts here involved were, in substantial part, entered into in 1940, 1941, and 1942, prior to April 28, 1942, the date of the statute, and the amendments of October 21, 1942 and July 14, 1943. (Complaint, paragraphs 22 and 24; R. 9-10).

The grounds upon which unconstitutionality of the statute rest are, inter alia,

(a) The statute vests in appointed executive and administrative officials authority to repudiate prior existing contracts between appellant and the United States and others, and to pay for property acquired from appellant under such contracts, such prices therefor as in the opinion of these executive or administrative officers should be paid, the position of appellant being that since the Fifth Amendment guarantees due process and payment of just compensation such a statute is a violation thereof.

(b) The statute authorizes by its retroactive provision, and the complaint alleges, the repudiation of prior valid existing contracts between appellant and the United States, in violation of the Fifth Amendment.

(c) The statute delegates to appointed executive and administrative officials and permits them in turn to redelegate ad infinitum unrestricted legislative and judicial functions without standards of any nature and therefore violates Article I, Section 1; Article I, Section 8, Clause 18; and Article III, Section 1, of the Constitution of the United States, and

(d) The statute in legal effect delegates to appointed executive and administrative officials the authority to impose a super excess profits tax on such persons as in their unrestrained opinions should pay such tax and in such amounts as in their unrestrained opinions should be paid, in violation of said provisions.

On March 9, 1944, after the complaint had been served, the parties entered into the following stipulation (R. 17-18):

"Stipulation Suspending Payment and Intermediate Action

It is hereby stipulated by and between plaintiff above-named and defendants above-named by their counsel duly authorized thereto as follows:

1. Defendants will cause the Navy Department to suspend payment, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department to plaintiff through the office of:

Certification and Disbursing Division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C.

(e) The statute undertakes to vest in biased executive agencies with whom appellant made its contracts, the right to repudiate those contracts and fix a price for appellant's property, which action violates the "due process" clause of the Fifth Amendment of the Constitution of the United States in that it makes it impossible for appellant to receive a fair hearing or the rudimentary right of fair play from an independent and impartial administrative agency.

(f) The statute undertakes to discriminate, without any reasonable basis therefor, against excessive profits from contracts with certain government agencies and authorizes the granting of such exemptions therefrom as the appellee and his delegates, in their opinion, may see fit.

(g) The statute lacks due process and is unconstitutional from a procedural standpoint.

(h) The statute is, by its terms, arbitrary and discriminatory.

The complaint further alleged that the statute was unconstitutionally applied on the basis of the following facts as averred in the complaint:

(i) In arriving at his unilateral order of March 4, 1944, facts were considered by appellee which were obtained from "governmental or other reliable sources" and appellant was never apprised of these facts although request was made for such information. (Par. 21: R. 8-9.)

(j) No facts were found to support the unilateral order, and in fact appellant was refused information as to how the appellee and his board arrived at their conclusions. (Par. 21: R. 9.)

up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944, as set forth in paragraph 8 of the complaint herein. Plaintiff consents to such suspension until final determination of this action by the Court of last resort.

2. In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in paragraph 1.

3. Plaintiff will not apply to the Court for any interlocutory injunction, restraining order, or other temporary or intermediate injunctive relief pending the final determination of this action by the Court of last resort, either as prayed for in paragraphs (a) or (c) of the prayer of its complaint herein, or otherwise.

4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make any admissions with respect to their rights or claims, it being understood by the parties hereto that this agreement shall be without prejudice to their substantive rights.

MILLS AND KILPATRICK,

By [S.] CHARLES EFFINGER SMOOT,
[S.] W. DENNING STEWART,
Counsel for Plaintiff.
[S.] FRANCIS M. SHEA,
Asst. Atty. Gen.,
Counsel for Defendants.
3/9/44."

On June 12, 1944, the appellee filed his answer raising numerous issues of fact (R. 18-34).

On December 8, 1944, appellee filed a motion to dismiss (R. 41) asserting—

> "1. The Court lacks jurisdiction over the subject matter of the action; and
>
> 2. The complaint fails to state a claim against the defendant upon which relief can be granted."

In the alternative, appellee moved for summary judgment and offered the verified answer and an affidavit in support of both motions (R. 41). The substance of the affidavit (R. 41-49) is that since appellee says he need not look any further than the unpaid vouchers payable to appellant on which payment has been suspended, he neither will nor can proceed to collect, by withholding or otherwise, any further sum from appellant on account of excessive profits realized during its fiscal years 1941 and 1942. Appellant filed an answering affidavit denying certain of the averments (R. 45) of appellee's affidavit (R. 49-54).

The court below, upon consideration of the complaint, answer, and affidavits (R. 63), without passing upon the constitutional issue or whether appellee was acting in excess of his statutory authority, and disregarding the prayer for declaratory judgment, sustained one ground asserted in appellee's Motion to Dismiss, namely, that the Court lacked jurisdiction over the subject matter, the Court stating among other things that the United States was a necessary party because the effect of an injunction would be to require payment to appellant of the amounts due it on its contracts with the United States out of the Treasury and thus, in effect, compel specific performance on the part of the Government of its contracts (R. 61). Two opinions were filed (R. 54-62). Mr. Justice Miller concurred in the opinion of Mr. Justice McGuire (R. 54-62). Mr. Justice

Bailey filed a separate opinion in which the other two Justices concurred (R. 62).

Specification of Errors

Appellant relies on all errors asserted in its Assignment of Errors (R. 64-66) and Statement of Points to be Relied Upon (R. 68-70), but in view of the order of this Court of June 11, 1945 noting probable jurisdiction (R. 71-72), restricting argument to the points there designated, appellant understands that it is not permitted to argue any other errors contained in its Assignment of Errors. Assignment of Errors 1 and 14-16 and Points 1 and 9-17 (R. 64-66 and 69-70) raise the points permitted by the order of this Court.

ARGUMENT

Preliminary Statement

This Court by its order (R. 71-72) has restricted the argument in this case to these points:

1. Whether this is a suit against the United States.
2. Whether the complaint states a cause of action in equity.
3. This Court has also afforded counsel the privilege of arguing the legal significance of appellant's failure to proceed before the Tax Court as provided in Section 403 (e) of the Renegotiation Act of 1942 as amended.

We understand the constitutional issues are not to be argued, but that the statute here in question is to be assumed to be unconstitutional for the purpose of this argument.

I

The Case At Bar Is Ruled by Rickert Rice Mills v. Fontenot, 297 U. S. 110 (Rehearing Denied, 297 U. S. 726)

Upon the assumption that the Renegotiation Act of 1942, as amended, is unconstitutional, it logically and necessarily follows, we submit, that the unilateral order of appellee is

void and that appellant owes nothing and hence has no obligation to proceed in any other forum to establish that fact. Likewise, it being beyond dispute that appellant has refused to pay the sum demanded by appellee (R. 43), there is no reason for appellant to bring an action in any other forum to recover that which it has not paid.

It is submitted that since appellant has not paid the sum demanded by appellee (R. 43), and since its vouchers are held under the stipulation which merely suspends payment thereof (R. 17-18), the ruling of this Court in *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 (rehearing denied 297 U. S. 726 (1936)), is conclusive of all questions now before this Court. There, the opinion disclosing the facts, this Court held at p. 112:

> "The petitioner, a processor of rice, filed its bill in the District Court for Eastern Louisiana, to restrain the respondent from assessing or collecting taxes • • • The bill charges the exaction is unconstitutional and alleges the respondent threatens collection by distraint, which will cause irreparable injury, as the petitioner has no adequate remedy at law to recover what may be collected. A preliminary injunction was sought. The respondent filed a motion to dismiss, citing Revised Statutes § 3224, and § 21 (a) of the amended Agricultural Adjustment Act as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate, and complete remedy at law. • • •
>
> "In praying a writ of certiorari the petitioner asserted that by reason of the provisions of § 21 (d) it would be impossible to recover taxes collected, even though the act were unconstitutional, since the section forbids recovery except upon a showing of facts not susceptible of proof. This court granted the writ and restrained collection of the tax upon condition that the petitioner should pay the amount of the accruing taxes to a depository, to the joint credit of petitioner and respondent, such funds to be withdrawn only upon the further order of the court. • • •

"The changes made by the amendatory act of August 24, 1935, do not cure the infirmities of the original act which were the basis of decision in United States v. Butler, [297 U. S. 1,] ante, p. 1. The exaction still lacks the quality of a true tax. It remains a means for effectuating the regulation of agricultural production, a matter not within the powers of Congress.

"We have no occasion to discuss or decide whether § 21 (d) affords an adequate remedy at law. As yet the petitioner has not paid the taxes to the respondent, and, in view of the decision in the *Butler* case, hereafter cannot be required so to do. If the respondent should now attempt to collect the tax by distraint he would be a trespasser. The decree of the District Court will be vacated, an appropriate order entered directing the repayment to the petitioner of the funds impounded *pendente lite*, and the cause remanded to the District Court for the entry of a decree enjoining collection of the assailed exaction. * * *"

"Decree vacated."

In *United States* v. *Kansas Flour Mills Corp.*, 314 U. S. 212 (1941), this Court, relying on *Ricket Rice Mills* v. *Fontenot, supra*, said at p. 218:

"It is true that after that decision [U. S. v. Butler, 297 U. S. 1] a taxpayer's right to an injunction against the collection of the tax was clear."

II

This Is Not a Suit Against the United States

The principle of law announced in *Ex parte Young*, 209 U. S. 123, is controlling here. At page 159 this Court said—

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of

the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

In cases of this type the question is always present of the validity of the action of the defendant. The defense is ex necessitate a valid statute or a showing that the complained-of action is within the scope of the statutory authority: *United States* v. *Lee*, 106 U. S. 196 (1882); *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891); *Tindal* v. *Wesley*, 167 U. S. 204 (1897); *Scranton* v. *Wheeler*, 179 U. S. 141 (1900); *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28 (1901); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911); *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47 (1944); *Smith* v. *Jackson*, 246 U. S. 388 (1918), affirming 241 Fed. 747; *Miguel* v. *McCarl*, 291 U. S. 442 (1934). Action outside statutory authority is arbitrary in the proper sense of that term: *Adams* v. *Nagle*, 303 U. S. 532 (1938), and is a trespass: *Philadelphia Company* v. *Stimson*, 223 U. S. 605 (1912); *Waite* v. *Macy*, 246 U. S. 606 (1918); *Oklahoma ex rel., etc., Phillips* v. *Guy F. Atkinson Co.*, 37 Fed. Supp. 93 (1941), affirmed 313 U. S. 508 (1941).

To hold, as the lower Court held that without regard to whether the statute was unconstitutional or whether appellee was exceeding his statutory authority, the proceeding was in effect one against the United States, is to hold that appellant's property may be confiscated. The United States acquired appellant's property (material sold) by solemn contracts by which it agreed to pay therefor, but now through the device of passing a subsequent statute, although

it be unconstitutional, this Court is urged to hold that in effect the United States may repudiate those contracts and appellee may be authorized to withhold amounts otherwise due appellant on these and other contracts and appellant is helpless. Here the language of *United States* v. *Lee*, 106 U. S. 196, at p. 221, is quite appropriate. There this Court said:

> "It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court: Stop here; I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function; though the United States is no party to the suit; though one of the three great branches of the Government, to which by the Constitution this duty has been assigned, has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.
>
> "The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the Government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations."

When appellant attempts to prevent appellee's unlawful procedure by appealing to equity to enjoin, the appellee answers that he personally has no interest, that what he is doing is on behalf of the United States and that to prevent him from illegally seizing amounts otherwise due appellant on its lawful contracts is, in effect, taking money

out of the Treasury of the United States. Appellant is not asking any relief which will require this Court to produce one cent for it. Appellant is not asking that appellee, or the United States, be required to affirmatively do anything, *Ickes* v. *Fox*, 300 U. S. 82 (1937). Appellant seeks to prevent appellee from withholding or seizing its property, i.e., amounts otherwise due it, wherever situated, under an allegedly unconstitutional statute and by action beyond his statutory authority, if the statute be constitutional. As was well said by this Court in *Goltra* v. *Weeks*, 271 U. S. 536 (1926) at p. 544:

> "By reason of their illegality, their acts (of government officers) or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government."

And again in *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, at 644:

> "But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain immunity through them, fails in his defense and in his claim of exemption from suit."

The Court is not being asked to require Congress to appropriate funds because the record shows vouchers payable to appellant from funds already appropriated, have been issued and are in the hands of appellee as security (R. 17; 27-28, 44-46, 48-49). Prima facie these vouchers evidence an indebtedness due appellant from the United States—*Salomon* v. *United States*, 19 Wall. 17 (1873); *Countryman* v. *United States*, 21 *Court Claims* 474 (1866).

We also submit that appellee, by stipulating (R. 17; par. 1) that appellant should pledge its vouchers as security for whatever liability (if any) is finally determined to be due by a Court of last resort, thereby acknowledged ownership of the vouchers to be in appellant because appellant

could not pledge that which it did not own. It should also be noted that the stipulation expressly reserves the substantive rights of both parties (R. 18).

The important qualification of the stipulation is that appellant's vouchers are pledged as security only and to be used in payment only as the result of a determination of liability in whole or in part *by a Court of last resort* (R. 17-18).

In other words, appellee cannot look to these vouchers or the funds due thereon, unless a Court of last resort so decides. If that Court holds that appellee's unilateral order is void, we assume he will abide by that judgment and not interfere with whatever further action might be in order in regard to the vouchers. If appellee refuses, mandamus or injunction would lie: *Smith* v. *Jackson*, 241 Fed. 747, Affirmed, 246 U. S. 388; *Miguel* v. *McCarl*, 291 U. S. 422 (1934); *Richmond, F. & P. R. Co.* v. *McCarl*, (App. D. C.) 62 F. (2d) 203 (1932), Cert. Den. 288 U. S. 615 (1933). In the last cited case, which is applicable here, the Court said at p. 207:

> "The purpose of suit was not to challenge the discretion of the Comptroller General, but rather to challenge his authority to withhold a sum of money admitted to be due and payable. In such a case it is not necessary to join the United States."

Without regard to the stipulation, it is difficult to follow the reasoning which leads to the result that this suit is one in effect against the United States if the statute be unconstitutional or appellee has exceeded his statutory authority. It is not a party to the litigation and certainly a judgment here would in nowise affect the United States or adjudicate its interests, which is the test: *Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902). Even governmental immunity is not favored and there is no presumption that an agent is immune—*Reconstruction Finance Corporation*

v. *J. G. Meehan Corp.*, 312 U. S. 81 (1941). The mere fact that the funds necessary for the payment of a judgment come out of the Treasury of the United States is no answer—*Sloan Shipyards Corp.* v. *United States Shipping Board, etc.*, 258 U. S. 549 (1922); *Commonwealth Finance Corp.* v. *Landis*, 261 Fed. 440 (D. C. Pa.) (1919).

Just how an order which enjoined appellee from enforcing his illegal unilateral order or adjudging it to be void would in any manner or way compel the United States to pay appellant is not clear. True, an order may remove an illegal impediment to payment for goods sold and delivered by appellant to the United States and for which it has already promised to pay and for which vouchers have already been issued. The Renegotiation Act assumes that the United States has agreed to pay because appellee is directed by it (Sec. 403 (c)(2)), to withhold "amounts otherwise due" to appellant. If there is any defense to payment for these goods, certainly nothing which occurs in this case will affect that defense. It is clear there is no defense because vouchers authorizing payment have been issued (R. 27-28, 44-46, 48-49). We take it that nobody will seriously urge that if appellee were to be enjoined from carrying out his unilateral order by withholding or seizing amounts otherwise due from appellant's contractors (R. 6) that such a judgment would in effect be one against these contractors, or that it would produce one cent for appellant from these contractors. We fail to see any real distinction between money due appellant from the United States and that due it from its contractors. If appellee's unilateral order (R. 5-6) is illegal, then he is a trespasser if he attempts to seize appellant's property without regard to where it may be found. It strikes us as a rather shocking idea that although appellee may be a trespasser, he acquires immunity from his illegal acts by confining his trespass to appellant's unpaid vouchers, but payable to it, even though

the funds therefor come from the Treasury of the United States. This is not the law because the courts have denied immunity when alleged trespasses involved real and personal property owned by the United States as well as attempts to allegedly unlawfully interfere with the payment of funds from the Treasury of the United States: *Smith v. Jackson*, 246 U. S. 388 (1918), affirming 241 Fed. 747; *Miguel* v. *McCarl*, 291 U. S. 442; *Magruder* v. *Water Users' Association* (C. C. A. 8th) 219 Fed. 72 at 78 (1914); *R. F. & P. R. Co.* v. *McCarl* (App. D. C.) 62 F. (2d) 203 (1932), Cert. Den. 288 U. S. 615 (1933); *Miller* v. *Standard Nut Margarine Co. of Florida*, 49 F. (2d) 85 (C. C. A. 5th) (1931); Affirmed 284 U. S. 498 (1932); *Wells* v. *Nickles*, 104 U. S. 444 (1882); *United States* v. *Lee*, 106 U. S. 196; *Work* v. *Louisiana*, 269 U. S. 250 (1925); *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943). In the last cited case, this Court said at p. 584:

> "If he (government officer) is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law which exonerates him."

If the contention that this is a suit against the United States to which it has not consented, be sound, then as to the amount which appellee threatens to withhold, it has not consented to be sued in any forum and the result is that appellee may illegally deprive appellant of its property and appellant is helpless to prevent such deprivation. If this be so, there are no constitutional limitations because there is no way of testing the constitutionality of appellee's illegal action: *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 37 Fed. Supp. 93, 95 (1941), Affirmed 313 U. S. 508 (1941); *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192 (1941); Cert. Den. 314 U. S. 694. To accept the contention that this suit in effect compels the United States to specifically perform its contracts to pay for material sold and delivered to it by appellant, necessarily

assumes, we submit, that the United States will refuse to pay, an assumption which is not in accordance with good faith in meeting public obligations. The fact is, the United States has already, in effect paid, because vouchers have been issued to appellant's order and are being held as security (R. 17-18, 27-28, 44-46, 48-49). All that remains to be done, as we understand the situation, is a ministerial Act, namely, to have a disbursing officer of the Department issue checks in payment of the approved vouchers, which are authority for the issuance of the checks (R. 45-46). The vouchers belong to appellant and must be delivered to it if appellant is eventually successful in this litigation: The stipulation so contemplates.

The language of Mr. Justice Miller in *United States* v. *Lee*, 106 U. S. 196, is of great significance here. In that case, which was an action in ejectment to recover the possession of property from officers of the United States, whose defense was that they had no personal interest in the property, but were holding it for the United States, this Court, after a review of numerous cases, said at p. 219 et seq.:

> "The position assumed here is that, however clear his [a citizen] rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question.
>
> "But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?
>
> "In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a *case* within the meaning of that term, as employed in the Constitution and

defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration.

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery."

And at p. 220:

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

There are numerous cases illustrating the point and demonstrating the fallacy of the reasoning of the Court below. One need only examine the cases analyzed in *United States* v. *Lee, supra*; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Tindal* v. *Wesley*, 167 U. S. 204; *Ex Parte Young*, 209 U. S. 123; *Smith* v. *Jackson*, 246 U. S. 388 (affirming 241 Fed. 747); *Miguel* v. *McCarl*, 291 U. S. 442 and *Perkins* v. *Elg*, 307 U. S. 325 (1939), to ascertain that enjoining illegal action under an unconstitutional statute or action beyond statutory authority is not the equivalent of requiring affirmative action nor does it amount to a suit against the sovereign. A case in point is that of *Nece* v. *Morgan Co.* (C. C. A. 8th), 106 F. (2d) 746 (1939), where the Court enjoined the defendant from making an unlawful charge against money due from the United States. To the same effect is *Berger* v. *Ohlson* (C. C. A. 9th), 120 F. (2d) 56 (1941); *Magruder* v. *Water Users' Association* (C. C. A. 8th), 219 Fed. 72, and *Goldman* v. *American Dealers Service, Inc.* (C. C. A. 2d), 135 F. (2d) 398 (1943).

III

The Complaint States a Cause of Action in Equity and Grounds for a Declaratory Judgment

Whether this objection is open to appellee is questionable. The ground under which this objection will apparently be urged is that the Court was without jurisdiction over the subject matter of the action (R. 44). Jurisdiction being the power to decide surely the Court has power to decide whether there is jurisdiction in equity—*Sperry Gyroscope Company* v. *Arma Engineering Company*, 271 U. S. 232 (1926); *Douglas* v. *Jeannette*, 319 U. S. 157 (1943).

There is no longer any distinction procedurally between law and equity: *Grauman* v. *City Company of New York*, 31 Fed. Supp. 172 (D. C. N. Y.) (1939), and hence the

question here is not, we believe, whether there was jurisdiction in equity, but whether the facts averred in the complaint disclose any grounds for sustaining the jurisdiction of the lower Court. In this connection it is important to bear in mind that the complaint contains a prayer for declaratory judgment relief (R. 16-17), which is not only proper, but on the basis of the facts averred, established the right to such relief: 28 U. S. C. 400; Federal Rules of Civil Procedure, Rule 57; *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249 (1933) and *Aetna Ins. Co.* v. *Haworth*, 300 U. S. 227. In *Waterman Steamship Company* v. *Emory S. Land* (App. D. C.) (decided June 18, 1945 and not officially reported) the Court, in a case involving the Renegotiation Act of 1942 held that declaratory judgment relief was proper.

That equity is the proper jurisdiction for injunctive relief where a proceeding is against an individual defendant who is allegedly acting under an unconstitutional statute or beyond his statutory authority, if irreparable injury is shown, is settled by numerous cases in this Court, *inter alia*, *Stark* v. *Wickard*, 321 U. S. 288 (1944); *Goltra* v. *Weeks*, 271 U. S. 536 (1926); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Ex Parte Young*, 209 U. S. 123.

We also urge the Court to note that under the prayer for a declaratory judgment (R. 16-17), irreparable injury and an adequate remedy elsewhere are immaterial: *N. C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249; *Doehler Metal Furniture Co.* v. *Warren* (App. D. C.), 129 F. (2d) 43 (1942) (cert. denied 317 U. S. 663); *Delno* v. *Market St. Rwy. Co.* (C. C. A. 9th), 124 F. (2d) 965 (1942).

If appellee is permitted to withhold the amounts otherwise due appellant from the United States and appellants' contractors, he will, under the statute (Section 403(c) (2) (v)), be obliged to turn such amounts into the Treasury of the United States as miscellaneous receipts and thereby render it impossible for appellant to recover

them as the statute does not provide for suit against the United States. When the complaint was filed neither a refund nor interest were recoverable. These considerations establish irreparable injury and sustain jurisdiction in equity: *Ohio Oil Co.* v. *Conway*, 279 U. S. 813 (1929); *Fox* v. *Standard Oil Company*, 294 U. S. 87 (1935); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (cert. den. 298 U. S. 688) (1936); *Educational Films Corp. of America* v. *Ward*, 282 U. S. 379 (1931); *United States* v. *Goltra*, 312 U. S. 203 (1941).

The complaint also alleges that (R. 9-11) contracts were included which are not within the statute and this sustains equity jurisdiction: *Waite* v. *Macy*, 246 U. S. 606 (1918); *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932).

The complaint alleged (par 34; R. 15) appellant would be obliged to bring a multiplicity of costly and vexatious suits against numerous of its customers scattered through out the United States and that appellee's threatened actions, i. e., threat to cause appellant's customers to withhold payment on their contracts would seriously interfere with the business relations between appellant and its customers to its serious financial disadvantage. These allegations are to be taken as true: *Polk Co.* v. *Glover*, 305 U. S. 5 (1938); *Utah Fuel Company* v. *National Bituminous Coal Commission*, 306 U. S. 56 (1938); *Gibbs* v. *Buck*, 307 U. S. 66 (1939). And sustain equity jurisdiction.—*Wilson* v. *Illinois Southern Railway*, 263 U. S. 574 (1924); *Allen* v. *Regents*, 304 U. S. 439 (1938); In *Petroleum Exploration Company* v. *Public Service Commission*, 304 U. S. 209 this Court said at 217—"For determination of the adequacy of this remedy [plain, adequate and complete remedy at law] we must here assume the allegations of appellant that unless an injunction is granted, irreparable

injury will flow from its compliance with the order of May 29."

At the time the complaint was filed, appellee had threatened to not only withhold amounts otherwise due appellant from the United States, but as well, amounts due it from its numerous contractors (R. 5-6). It is well settled law that jurisdiction is determined by the facts as they exist when the complaint is filed: *Camp* v. *Boyll*, 229 U. S. 530 (1913); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920); *Consolidation Coal Company* v. *Railway Co.* (D. C. Md.) 44 F. (2d) 595 at 596 (1930). The belated attempt by the appellee to defeat jurisdiction by changing his mind and stating that he would look only to the pledged vouchers months after the complaint was filed (R. 28, 34, 45-46, 49), is of course of no legal consequence because, as was well said by Lord Justice James in *Morley* v. *White*, L. R. 8 Chancery App. Cases 734:

> "I know of no authority or principle by which it can be established that, when this court has been properly applied to because there was no adequate remedy at law, the defendant can afterwards put in a plea in the nature of puis darrein continuance, to the effect that, since he put in his answer to the original bill, he has removed the obstacle which prevented the plaintiff from suing at law. It would be a monstrous result, if, after a plaintiff had rightly commenced proceedings in this court, a defendant could say: 'I have but now removed the legal difficulty. Be good enough to dismiss your bill and sue me at law.'"

The evident purpose of the stipulation was to preserve the status quo as of the date of the stipulation. The stipulation was in lieu of injunctive relief and nothing either party to the stipulation did thereafter could be or in fact, has, altered the then-existing rights of the parties to the litigation (par. 2-3, R. 18). The appellant posted

security, i.e., its Government vouchers, to assure payment of any liability which it was ultimately determined by a Court of last resort to owe (par. 1, R. 17). The appellee was then assured of payment if it was finally determined there was liability. His hands from that point were effectually tied. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936). Of course, appellee had no need to look any further for payment than the pledged funds. If an injunction bond had been given, he would have looked to it. The legal situation as the result of the stipulation is the same.

IV

The Tax Court

In view of *Rickert Rice Mills* v. *Fontenot*, 279 U. S. 110 (rehearing denied 297 U. S. 726), and the assumption of unconstitutionality, it seems unnecessary to pursue the Tax Court aspect of this case any further. We also suggest that if proceedings in the Tax Court be considered mandatory then the question of the constitutionality of the statute in this respect, is raised by appellant and this question may not be argued here, under the order of this Court.

As a matter of precaution, we suggest that the basis for the rule of the exhaustion of administrative remedies is that it is necessary to afford the administrative body an opportunity of exhausting the administrative process on administrative questions before resort is had to a Court. Where there is nothing upon which the administrative process can act, certainly there is no reason for requiring a futile resort to an additional administrative body: *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *Turner D. & L. Lumber Co.* v. *C. M. & St. P. Railway Co.*, 271 U. S. 259 (1926); *Gully* v. *Interstate Natural Gas Co.* (C. C. A. 5th) 82 F. (2d) 145 (1936) (Cert.

denied, 298 U. S. 688 (1936); 8 Fed. Supp. 174 (1934). There is nothing in this case upon which the Tax Court may act. If there is no liability there is no need to go to the Tax Court. We repeat that what we seek is to prevent this individual appellee from carrying out his illegal order and threat, which was promulgated by him, we respectfully insist, under an unconstitutional statute and in excess of his statutory authority. This is an individual wrong. *Sterling* v. *Constantin*, 287 U. S. 378. The only questions here are judicial ones and these are for the courts: *Brown & Sons Lumber Co.* v. *Louisville & R. Co.*, 299 U. S. 393 (1937). The order of the appellee cannot be collaterally attacked: *Ingham* v. *Union Stock Yards Co.* (C. C. A. 8th) 64 F. (2d) 390 (1933).

The jurisdiction of the Tax Court is definitely restricted by the statute "* * * to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor and such determination shall not be reviewed by any court or agency." (Section 403(e)(1).)

Here is a plain definition of the limited authority of the Tax Court to consider nothing but a fact question—the amount of excessive profits if the contractor desires such further determination. It completely negatives any grant of judicial authority and this, no doubt, for the reason that the Tax Court is neither a judicial or a quasi-judicial body, but a mere executive agency.

It should also be noted that there is no right of appeal in the renegotiation statute, and certainly the present statutory provisions for review in tax matters are not applicable here.

The Tax Court is a creature of Congress, an executive or administrative agency (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716 (1929)), and cannot have any

greater powers than its creator. The statute creating it provides that it is "an independent agency in the executive branch of the Government"—26 U. S. C. ~~1212~~ 1288. This Court so regards it: *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926); *Blair* v. *Osterlein Machine Co.*, 275 U. S. 220 (1927). In his concurring opinion in *Bingham's Trust* v. *Commissioner of Internal Revenue*, 325 U. S. — (decided June 4, 1945), Mr. Justice Frankfurter aptly defined the powers of the Tax Court as follows:

> "On the other hand, constitutional adjudications, determination of local law questions and common law rules of property, such as the meaning of 'a general power of appointment' or the application of the rule against perpetuities, are outside the special province of the Tax Court."

The Tax Court being a creature of Congress could not deny the authority of its creator. It would have to assume the constitutionality of the statute: *Buder* v. *First National Bank*, 16 F. (2d) 990 (C. C. A. 8th) (1927) (Cert. denied, 274 U. S. 743 (1927); *Engineers Public Service Co.* v. *Securities & Exchange Comm.* (App. D. C.), 138 F. (2d) 936, 952 (1943) (Cert. granted 322 U. S. 723 (1944));

The prime function of an administrative agency, as an arm of the legislature, is to determine the factual matter within the legislative province. What Congress cannot constitutionally do, its creature cannot do. The Tax Court cannot correct the wrong alleged here. There is no delegation, in this statute, of authority to the Tax Court to pass on legal or constitutional questions and, under the facts here involved, Congress, it is submitted, could not delegate such authority. For example, we insist that Congress cannot constitutionally reach contracts entered into prior to the date of the statute and that it cannot authorize repudiation of prior contracts and give executive officers

the unrestricted privilege of determining what is just compensation. Can the Tax Court determine these legal questions, and is such a determination not to be reviewed by any Court? Can the Tax Court determine whether a contract is divisible and in part not subject to the statute or will it have to take the statute as it is written? These are questions going to the power of Congress and to the jurisdiction of its creature which, we submit, are constitutionally beyond the power of Congress. They and similar questions are for a court to determine. If the Tax Court has the right to determine these questions, it is acting judicially and not administratively, and this Court is likewise entitled to determine them in this proceeding: *City Bank* v. *Schnader*, 291 U. S. 24 (1934); *F. T. C.* v. *Curtis Pub. Co.*, 260 U. S. 568 (1923).

We are not asking the Court to substitute its judgment on any matter to be passed upon by the administrative agency—The Tax Court: *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919); *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); and *Turner D. & L. Lumber Co.* v. *C., M. & St. P. R. Co.*, 271 U. S. 259 (1926). We respectfully insist that the matters involved in the complaint were beyond the powers of Congress and the appellee, because Congress has acted unconstitutionally.

In *Buder* v. *First National Bank*, 16 F. (2d) 990 cert. denied 274 U. S. 743, the Court said at p. 992:

> "The defendants also contend that there was available to the plaintiffs a remedy through the administrative tax boards of Missouri, and that, not having sought that remedy, they cannot maintain this suit (citing cases). In those cases, however, the complainants were of invalid assessments under existing laws. Here the complaint is of an assesment under no law at all.
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> "In *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000, in which it was held that a

suit in equity would lie to enjoin the exaction of the illegal or unconstitutional excess of a tax, it was said, relative to administrative remedies:

"'To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property.'

"Here, if there was no law, there was no jurisdiction to assess the shares of stock. There could be nothing more futile than an application for administrative relief in a case of this kind. If section 12775 was in force, the tax was properly assessed; if it was not in force, there was no such tax. No administrative officer or board of Missouri could do otherwise than assume the validity of the law under the circumstances, and there was, as a matter of fact, no administrative remedy."

In *Gully* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 cert. nied 298 U. S. 688, where it appeared that a claim for a x exemption would be denied, the statute providing for an peal with supersedeas, the Court said there was no neces- y for appeal to a Court as provided by the State statute. he Court below also pointed out there was no certainty as the administrative remedy or of a refund: 8 Fed. Supp. 4, 175.

In the case at bar, the sole questions before the Court are es of law—constitutional and constitutional application the statute—questions over which the Tax Court, an dministrative body, has no jurisdiction. As was well said *Federal Radio Comm.* v. *Nelson Bros. B. & M. Co.*, 289 S. 266, at 277 (1933):

"If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding."

Another question arises—would appellant, by going to the Tax Court, i. e., invoking the statute, deprive itself of the right to insist upon its constitutional rights? Whether right or wrong, the Tax Court in *Cappellini* v. *Commissioner*, 14 B. T. A. 1269, so held. This Court recognized this defect in *Ex parte Fassett*, 142 U. S. 479 and *De Lima* v. *Bidwell*, 182 U. S. 1 (1901). Again if appellant had gone to the Tax Court it might be held to have made an election of forums—*Standard Oil Co.* v. *United States*, 283 U. S. 235. Surely all this uncertainty demonstrates that appellant is in the proper Court for the determination of its constitutional rights.—*Union Pacific R. R. Co.* v. *Weld County*, 247 U. S. 282 (1916).

The appellee has unilaterally determined, illegally we say, that appellant should refund $1,014,873.78 (R. 49), and appellant insists that, under the Constitution, appellee had no right to make such a determination—as a matter of law. In other words, if appellant fails in its legal contentions, it loses the $1,014,873.78. There is no factual situation in this case upon which the administrative process can act: *Southern Blvd. R. Co.* v. *City of New York*, 86 F. (2d) 633 (C. C. A. 2nd, 1936) (Cert. Denied, 301 U. S. 703 (1937)), nor are there any mixed questions of law and fact. Whether a contract is within the statute is purely a question of interpretation of the contract and the statute, just as the interpretation of the tariff was the question in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. See also *I. C. C.* v. *Steamship Co.*, 224 U. S. 474 (1912); *C. M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (1890).

The Tax Court is an option or a privilege afforded those against whom a unilateral determination is entered for a *de novo* proceeding as to amount only. The statute provides (Sec. 403(e)(2)) that appellant "may" file a petition with the Tax Court and upon such filing the Tax Court shall have exclusive jurisdiction. If Congress had intended

exclusive jurisdiction in a case of this nature, it could very easily have used "shall". The obvious danger of making a further proceeding in the Tax Court mandatory was that it would have made the statute unconstitutional from a procedural standpoint because judicial review is forbidden. The learned Assistant Attorney General pointed out this deficiency to the Senate Committee (Hearings Before Senate Finance Committee 78th Congress on H. R. 3687, pp. 1036-1037). This is the plain meaning of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), and *Crowell* v. *Benson*, 285 U. S. 22 (1932) (see 80 U. Pa. L. Rev. 1055). See also *Engineers Public Service Co.* v. *Securities & Exchange Comm.*, 138 F. (2d) 936 (cert. granted 322 U. S. 723). It is also to be noted that in the case of an order entered by the War Contracts Price Adjustment Board, which has been created by the 1944 amendments, the statute expressly provides that if that board issues an order then, if a petition is not filed in the Tax Court, the order of the Board shall be final (Sec. 403(c)(1)), but it is to be noted that where, as here, a unilateral order has been entered by the Secretary, the statute does not give an exclusive jurisdiction to the Tax Court without qualification. It simply provides an option to the party against whom the unilateral order is entered to go to the Tax Court, and, if a petition is filed in the Tax Court, then the Tax Court has exclusive jurisdiction over such matters as are committed to it by the statute, namely, the determination of the amount of the excessive profits received or accrued by the contractor, and this according to its uncontrolled opinion.

The proceeding before the Tax Court may take years to finally determine with no right of judicial review. In fact, the statute plainly provides (Sec. 403(e)(1)), that the "determination" of the Tax Court "shall not be reviewed or redetermined by any court or agency." In the meantime,

the statute plainly provides that there shall be no stay of the unilateral order (Section 403(e)) and there is no certainty of a refund in the event of a favorable determination by the Tax Court. These considerations sustain equity jurisdiction: (1936); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924); *Champlain Ref. Co.* v. *Corporation Com.*, 286 U. S. 210 (1932); *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 (1937); *St. L. & S. F. Ry. Co.* v. *Alabama Public Service Commission*, 279 U. S. 560 (1929); *Porter* v. *Investors' Syndicate*, 286 U. S. 461 (1932); *Ohio Oil Co.* v. *Conway*, 279 U. S. 813.

In *Stark* v. *Wickard*, 321 U. S. 288 (1944) (Below 136 F. (2d) 786) (1943), where an injunction was sought to prevent the Secretary of Agriculture from illegally diverting funds of the plaintiffs, this Court said at p. 290:

> "The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit; but in order to recover, the petitioners must go further and show that the act of the secretary amounts to an interference with some legal right of theirs. If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed."

And again at p. 310:

> "The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. United States v. Morgan, 307 U. S. 183, 190, 191, 83 L. ed. 1211, 1216, 1217, 59 S. Ct. 795. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and

the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administraitve power."

Conclusion

In conclusion, we respectfully submit that for the reasons heretofore given, the order of the lower Court should be reversed and the case proceeded with on the basis of the law as announced in *Polk Co.* v. *Glover,* 305 U. S. 5, where this Court said at p. 10:

> "The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. * * * And that determination requires a hearing in due course upon the issues raised by the pleadings."

This was the attitude of the three-Judge Court (Justices Groner, Bailey and Goldsborough) in *Lincoln Electric Company* v. *Knox,* 56 Fed. Supp. 308, a case substantially the same on its facts as the case at bar. There the Court said at page 310:

> "Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.
>
> "We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given

the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing. If the Renegotiation Act is in all respects valid, obviously, plaintiff has no case. If, on the other hand, it is invalid, and the Government, as we have indicated, is not an essential party, then, clearly, plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some other manner obviously inadequate and incomplete."

Respectfully submitted,

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Howard Zacharias,
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Charles Effinger Smoot,
Counsel for Appellant.

APPENDIX A

The 1942 Renegotiation Act as Amended

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or • • •

(omitted portions refer to so-called "war brokers")

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000, hereafter made by such department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i) made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct; and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such ex-

cessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) • • •

(Omitted portion refers to recognition of deductions, credits, etc.)

(4) • • •

(Omitted portion refers to agreements.)

(5) • • •

(Omitted portion relates to filing of information, time for commencement of renegotiations, etc.)

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made, and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii)) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the

fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) • • •

(Omitted portion provides for Secretary obtaining information.)

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that De-

partment, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

(i) (1) the provisions of this section shall not apply to— * * *

(Omitted portion provides for exemptions.)

(j) * * *

(Omitted portion provides exemptions to permit intermittent and temporary employees to prosecute claims against the United States.)

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

(Section 403 of the Act of April 28, 1942, the Sixth Supplemental National Defense Appropriation Act, 1942, as amended October 21, 1942, July 1, 1943 and July 14, 1943 (56 Stat. 226, 245, 56 Stat. 798, 982, 57 Stat. 347, 348, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III, Tile 50, Appendix 1191). Note: The Acts approved October 21, 1942, and July 14, 1943, specifically provide that the amendments made to section 403 by those Acts shall be effective as of April 28, 1942, the date of the approval of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.)

The 1943 Renegotiation Act

Sec. 403(a) (4) (C) and (D)

* * * * * * * *

(Omitted portions relate to allowances of costs and rebates.)

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under

this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403 (i) (1) (C), (D), and (F).

* * * * * * * *

(Omitted portions relate to exemptions.)

Sec. 403 (i) (3).

* * * * * * * *

(Omitted portions relate to natural resources and increments in the value of excess inventories.)

ec. 403 (1). This section may be cited as the "Rene-
iation Act."

Section 403 of the Sixth Supplemental National De-
se Appropriation Act, 1942, as amended by Section
(b) of the Act of February 25, 1944 (58 Stat. 78-92)
l which according to subsection (d) of said section 701
ll be "effective as if such amendments and subsections
l been a part of section 403 of such Act on the date of
enactment"—April 28, 1942. This so-called 1943 Re-
gotiation Act—without the so-called 1942 Renegotiation
t—may be found in Title 50 of the United States Code
notated Appendix, Section 1191, 1944 cumulative an-
al Pocket Part.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

W. Denning Stewart,
Mahlon E. Lewis,
Howard Zacharias,
Charles Effinger Smoot,
Counsel for Appellant.

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REPLY BRIEF ON BEHALF OF APPELLANT

I

In the absence of a statute divesting the District Court of jurisdiction, appellant cannot be required to go to the Court of Claims and appellee is not entitled to assert that appellant should go to that court; the remedy there is not plain, adequate and complete.

We venture to repeat that, upon the basis of the assumption of the unconstitutionality of the statute, appellee's unilateral order is void; the appellant owes nothing, and not having paid anything, there exists no valid reason for

requiring it to sue to recover in any other forum, particularly in a legislative tribunal, in order to permit the assertion of a set-off which is presumably void.

The reasoning of Mr. Justice Cardozo, speaking for the dissenting Justices, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, at p. 338, is quite apposite here:

> "If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. (Citing cases). It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§ 3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser."

In the light of the allegations of the complaint (Pars. 22 and 24, R. 9-10) that contracts which were not within the statute, were included in renegotiable business, the language of *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, at p. 510, is in point:

> "This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force."

To the same effect is *Ogden City* v. *Armstrong*, 168 U. S. 224 (1897).

We submit that appellee cannot oust the jurisdiction of a constitutional court, in this action against him, by asserting that appellant should be required to go into the Court of Claims, a legislative court which may be abolished tomorrow *Maricopa County, Arizona,* v. *Valley National Bank of Phoenix,* 318 U. S. 357 (1943); *United States* v. *60,000 Square Feet of Land and Eight-story Hotel Thereon Known as Oakland Hotel,* 53 F. Supp. 767 (D. C. Cal.) (1943)) in an action against another party, the United States.

The appellee's unilateral order cannot be collaterally attacked (*Inghram* v. *Stockyards Co.,* 64 F. (2d) 390 (C. C. A. 8th)) and moreover, appellant cannot be compelled to bear the burden of establishing the invalidity of appellee's actions in order to recover funds admittedly due it on its valid and completed contracts: *Smith* v. *Jackson,* 246 U. S. 388 (1918); *Miguel* v. *McCarl,* 291 U. S. 442 (1934); *McCarl* v. *Cox,* 8 F. (2d) 669 (App. D. C.) (1925) (Cert. denied, 270 U. S. 652); *R., F. & P. R. Co.* v. *McCarl,* 62 F. (2d) 203 (App. D. C.) (1932) (Cert. denied, 288 U. S. 615). In *McCarl* v. *Cox, supra,* the Court said at p. 670:

> "Alluding to the contention of the government that the officer had mistaken his legal remedy and should have sued in the Court of Claims, the court [Mare v. Alexander, 2 F. (2d) 895 (D. C., Mass.)] added: 'The answer to this contention is that the Comptroller General has mistaken his remedy. Instead of recovering for the United States the sum deemed to be due by an imperial fiat—let this be done—without hearing the parties in interest, he should have instituted a suit in a court of justice. U. S. v. Olmsted, 118 F. 433, 55 C. C. A. 249. Doubtless it would be convenient if the matter could be settled by the simple process of ordering the disbursing officer to withhold the lieutenant's salary—in the language of the street, "docking his pay"; but no such arbitrary power has been invested in the Comptroller General by this new legislation. As Judge Clay-

> ton emphatically remarks: "There cannot be such an autocrat. Our government cannot be reduced to a bureaucracy."

We also call attention to the language of *R., F. & P. R. Co.* v. *McCarl, supra,* at p. 207, where that Court said:

> "And so, in like manner, we think the suggestion of resort to the Court of Claims by appellant without merit. The debt to the carrier, as we have seen, is not disputed either as to amount or that it was then due and payable. A judgment of the Court of Claims would therefore merely have established something which is not contested."

To the same effect is *Hines* v. *United States, ex rel. Marsh,* 105 F. (2d) 85 (App. D. C.) (1939).

We also submit that appellee cannot assert that appellant has a remedy elsewhere at law against another party, the United States. The rule is that the adequate remedy must be available against the same person.

Barr v. *Roderick, et al.* (D. C. Cal.), 11 F. (2d) 984, 986 (1925);

Buttinghausen v. *Rappeport* (N. J. Ch.), 24 A. 2d 877, 880 (1942);

Jackson's Admx. & Heirs v. *Turner,* 5 Leigh (32) Va. 119, 125 (1834);

Thorn & Hunkins Lime & Cement Co. v. *Citizens' Bank of St. Louis,* 158 Mo. 272 (1900).

The contradictory nature of appellee's contentions in this respect is apparent. On the one hand he asserts that as to the amount he threatens to withhold, there is no remedy in the constitutional courts because, in effect, the suit is one against the United States, which has not consented to be sued, and hence the Court is without jurisdiction. This, of course, ignores the threat to order withholding from appellant's subcontractors. On the other hand,

appellee asserts appellant may avoid this difficulty by suing on its contracts for goods sold and delivered to the United States, in a legislative court, the Court of Claims, to recover the amount withheld from these contracts. If appellee's position be accepted, and we submit it should not be, then the United States has not consented to be sued anywhere and this obstacle cannot be circumvented, we submit, by an indirect attack by appellant on the unilateral order through the device of suing on the contracts on which appellee threatens to withhold amounts otherwise due appellant. Of course suit could not be brought in the Court of Claims on appellant's subcontracts because these are not with the United States. Furthermore, such a suit would no doubt be met with the defense that the provisions of the Renegotiation Act conferring exclusive jurisdiction in the Tax Court to finally determine the amount, if any, of excessive profits and providing that such determination shall not be reviewed or redetermined by any other court or agency, constitutes, in effect, a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

In addition, the Court of Claims has put appellant on notice that it will assume the constitutionality of the statute here involved because it held in *State of Alabama* v. *United States*, 38 F. (2d) 897 at p. 900 (1930) (Results affirmed, 282 U. S. 502, on ground court was without jurisdiction of cause of action):

> "Fifth. That where Congress has passed a statute authorizing the doing of a certain thing and the creation of a certain agency and given full authority to the executive to accomplish that purpose, and thus expressed its opinion of its constitutional right so to do, this Court will not undertake to deny the constitutionality of its action."

It is also submitted that interest not being recoverable in the Court of Claims (Judicial Code, Section 177, 28 U. S. C. 284), the remedy in that Court is inadequate. *Educational Films Co.* v. *Ward*, 282 U. S. 379 (1931). There this Court said at p. 386:

> "The equity jurisdiction to enjoin collection of the tax is not challenged. The legal remedy provided by the statute for the recovery of taxes after payment falls short of adequacy in at least two respects. Refund, if any, is expressly without interest. § 219 (d). (Citing cases) * * * But it is at least doubtful whether any refund can be compelled."

To the same effect are *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393 (1928) and *State of California* v. *Latimer*, 305 U. S. 255 (1938).

At the time the complaint in this case was filed, there was no possibility of a refund and even now there is no certainty in this case of a refund. True, the First Deficiency Appropriation Act of 1945, approved April 25, 1945 (Public Law 40—79th Congress) provides an appropriation of $15,000,000.00 for "Refunds under Renegotiation Act",[1] but there

[1] Refunds under Renegotiation Act: There is hereby appropriated, to remain available until June 30, 1946, such amount not exceeding $15,000,000.00 as may be necessary to make the refunds, including refunds for prior years, required by section 403 (a) (4) (D) (relating to the recomputation of the amortization deduction) and by the last sentence of section 403 (i) (3) (relating to excess inventories) of the Renegotiation Act; and to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity: Provided, That to the extent refunds are made from this appropriation of excessive profits collected under the Renegotiation Act and retained by the Reconstruction Finance Corporation or any of its subsidiaries the Reconstruction Finance Corporation or the appropriate subsidiary shall reimburse this appropriation: Provided further, That the War Contracts Price Adjustment Board or its duly authorized representative shall certify the amount of any refund to be made in pursuance hereof to the Secretary of the Treasury, who shall make payment upon such certificate in lieu of any voucher which might otherwise be required.

is no statute authorizing a refund. Certainly the meaning of this statute is uncertain and vague, to say the least. What does "erroneously collected" mean? Who is to decide whether there is to be a refund? Is the amount provided sufficient to cover all possible refunds? Will a proceeding in the Court of Claims be concluded by June 30, 1946? The United States has two years within which to apply for a new trial in the Court of Claims. (Act of March 3, 1911, 36 Stat. 1141, 28 U. S. C. 282). Legal interest is not provided for, and in fact payment of interest up to 4% is discretionary with someone who is not designated. This appropriation lapses June 30, 1946, and with about 300 cases pending in The Tax Court alone, a refund for appellant is, at least, uncertain. It is submitted that the language of this Court in *Graves* v. *Texas Company*, 298 U. S. 393 (1936) is controlling here. There this Court said at p. 402:

> "Appellants intimate, but do not definitely claim, that a distributor or dealer, if illegally compelled to pay taxes on sales to the United States, would under Alabama law be entitled to recover the amount so collected. They cite the Act of September 9, 1927, Gen. Acts 1927, p. 635. It appears to extend only to taxes paid while their amount or validity is in litigation. It contains no provision for interest. It was in effect when the attorney general made his ruling of November 22, 1928. They also cite the Act of July 17, 1931, Gen. Acts 1931, p. 527. It does not permit suit but merely authorizes the tax commission to refund. And finally they cite the Act of July 10, 1935. Section 379 gives to one who has paid taxes under protest the privilege of bringing suit within 60 days against the officer making the collection; it directs the court to determine what amount, if any, is excessive or illegal and to order it to be returned with interest by the State or its agencies receiving the same. Failure to sue within the specified period bars the claim. It is likely that a year or more would elapse before final determination of such a suit. In the meantime, monthly collections

would have to be made, and so appellee would be compelled repeatedly, and at least as often as once every sixty days, to bring suits against the commission involving the same question. Upon obtaining the court's determination in its favor, appellee would be authorized, on presentation of certified copies of the judgment, to receive from the State the half it retained and from each of the counties its share of the other half. It would be necessary to follow the same course as to the amounts claimed in each of the suits. Resort may be had to equity in order to avoid the multiplicity of suits necessarily involved in the procedure prescribed for recovery of illegal exactions.

"Appellee suggests that the provisions of the Act of July 10, 1935, are repugnant to § 14 of the Constitution of Alabama: 'That the State of Alabama shall never be made a defendant in any court of law or equity.' In support of that view, it shows that, since this suit was commenced, a telephone company brought suit under § 379 in the court below against the members of the state commission, appellants here, to recover license taxes paid under protest, and that they have filed a plea to the jurisdiction of the court, asserting that 'the real party in interest is the State of Alabama;' that § 379 purports to give the State's consent to be sued only in its own courts, and that it 'is immune from being impleaded in a court of the United States under the provisions of the Eleventh Amendment.'

"It sufficiently appears that appellee had no plain, adequate or complete remedy at law."

It is further submitted that even granting the certainty of a refund, under this statute which was enacted over a year after this action was instituted, this does not oust the equitable jurisdiction of the court. In *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, under analogous

circumstances, the late Mr. Justice Brandeis, speaking for this Court said at page 296:

> "Nor is the equitable jurisdiction lost because since the filing of the bill, an adequate legal remedy may have become available."

It is submitted that the threatened action of appellee in the case at bar is tortious, the liability individual (*Reconstruction Finance Corp.* v. *J. G. Menihan Co.*, 312 U. S. 81 (1941), and as the Court of Claims only has jurisdiction over claims arising out of contracts express or implied in fact, of the United States, *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212 (1926)); *State of Alabama* v. *United States*, 282 U. S. 502 (1931), it is without jurisdiction over appellant's claim for the amounts involved in appellee's threatened trespass. *United States* v. *Goltra*, 312 U. S. 203 (1941); *United States* v. *North American T. & T. Co.*, 253 U. S. 330 (1920). It requires a statute for the recovery against the United States of taxes illegally collected by a Collector of Internal Revenue: *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192 (C. C. A. 2d) (1941) (Cert. denied, 314 U. S. 694). Without such a statute, action against the Collector is the only remedy because the liability for the illegal exaction of taxes is personal and the United States has not consented to be sued: *Nicholl* v. *United States*, 7 Wallace 122 (1869); *Graham* v. *Goodcell*, 282 U. S. 409 (1931). Certainly a Collector cannot successfully maintain that a taxpayer should be forced into the Court of Claims, although the right to sue the United States now exists. A patent infringing government officer or contractor could not have so contended prior to the Act of July 1, 1918, 40 Stat. 705, 35 U. S. C. H 68, as his infringement was personal and subject to an injunction although the United States got the benefit of

his wrongdoing. *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331 (1928).

We submit, the inevitable logic of the cases beginning with *Sloan Shipyards Corp.* v. *U. S. Shipping Board,* 258 U. S. 549 (1922) and ending with *Brady* v. *Roosevelt Steamship Co.,* 317 U. S. 575 (1943), is: that where a government agent, individual or corporate, is subject to be sued, as the individual is here (although an alternative remedy may exist against the United States, unless Congress expressly makes that alternative remedy exclusive) the agent cannot escape liability for his wrongdoing, in a suit against him by asserting that liability exists in another.

We submit, the foregoing demonstrates beyond successful contradiction, that it cannot be held here that the remedy in the Court of Claims is plain, adequate and complete, which is the test for the ousting of equity jurisdiction. *American Life Insurance Co.* v. *Stewart,* 300 U. S. 203 (1937); *Davis* v. *Wakelee,* 156 U. S. 680 (1895); *Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282 (1916).

II

The Brief of Appellee

This is not a suit to enjoin appellee as Secretary of the Navy, as the brief of appellee reiterates. It is and has been from its inception, a suit against the individual defendant to enjoin him from committing a trespass against appellant's vested property rights and for a declaratory judgment to the same effect.

Appellant did not aver, as appellee states* (pp. 6 and 22), as additional grounds for relief "that appellant realized no excessive profits in 1941 and 1942" or "that the Secretary's renegotiation order is in error in finding that

* References are to pages of appellee's brief unless otherwise indicated.

appellant had realized any excessive profits * * *." These statements are contrary to the record. *Appellant asked no such relief and is not contesting here, and did not so contest in the Court below, the amount from a factual standpoint of appellee's unilateral determination.* Appellant has consistently contended that appelle's unilateral order is void, as a matter of law and in addition that he included as renegotiable business in arriving at the amount of his unilateral determination, contracts which were not within the statute. Appellee has lifted out of its context a portion of a sentence in paragraph 26 of the Complaint (R. 11) which, in full, is as follows:

> "26. Since the inception of renegotiation proceeding, plaintiff has insisted that neither factually nor legally is there a basis for a determination by defendants or their subordinates of excessive profits for 1941 or 1942 on its business, and that the Renegotiation Act is unconstitutional."

It is plain, we submit, that the foregoing language has but one meaning, namely, that appellant has protested the renegotiation proceeding from its inception. In any event, it has been plain from the beginning of this case that appellant is standing solely on legal grounds.

We also venture to point out that in quoting the prayers for relief, appellee has omitted to state that the complaint contained a prayer for general relief. Furthermore, the nature of the relief prayed for is immaterial on a motion to dismiss because the question then is whether the complaint is entitled to any relief. This is elementary, says the Court in *Morris & Co.* v. *National Association of Stationers, etc.*, 40 F. (2d) 620 (C. C. A. 7th) (1930). To the same effect is *Smith* v. *Buckeye Incubator Co.*, 2 F. R. D. 134 (1940).

Appellee states, p. 10:

> "By stipulation between the parties the elimination of appellant's excessive profits under the Secretary's order is being effectuated solely by withholding from appellant an equivalent amount of monies otherwise due it from the United States under contracts"

and at p. 12:

> "By stipulation with appellant, the Secretary has confined himself to the second method and has caused the net amount of the excessive profits, as determined in his order of March 4, 1944, to be withheld from appellant out of amounts otherwise due on certain of its contracts with the United States."

Appellee bound himself to do nothing to enforce his unilateral order of March 4, 1944, by the stipulation. It was not until June 12, 1944, when appellee filed his answer that appellant had an intimation that appellee would confine himself to withholding the amount covered by appellant's vouchers and not until December, 1944, that appellee definitely took such a position.

This characterization of the Stipulation is contrary to the plain language of the document. Of course, appellant did not so stipulate. The Stipulation is nothing but in effect a pledge with appellee as pledgee of appellant's vouchers, which are now due it, but on which payment was suspended with the consent of appellant as security for the payment of a liability, if any, "pending the final determination of this action" by the Court of last resort (Par. 1: R. 17-18). It is to be noted that the stipulation, paragraph 4 (R. 19), expressly provides:

> "4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make, any admissions with regard to their rights or claims, it being understood by the parties hereto that this agree-

ment shall be without prejudice to their substantive rights."

Appellee's argument as to the exclusive jurisdiction of the Tax Court is based upon a fallacious premise, namely, an assumption that the Tax Court provision of the Renegotiation statute is constitutional. The argument is that the Tax Court affords due process, which necessarily assumes a constitutional issue. As we understand the restrictions of the Order of this Court, we are not permitted to argue constitutional issues in advance of a determination of those issues by the Court below. We contended below and would so contend here, if permitted, that the Tax Court provision is unconstitutional for various reasons. We submit that appellee's argument conveniently ignores the constitutional limitations. If the argument now made by appellee is to be considered by this Court, we earnestly urge that we be permitted to argue the constitutional defects of the Tax Court provisions of the statute.

If the renegotiation feature of the statute alone be assumed to be unconstitutional, this assumption necessarily results in the conclusion that appellee's unilateral order is void and appellant owes nothing and that there is therefore no reason to go to the Tax Court to ascertain this fact for the second time. Appellee is a trespasser in attempting to enforce his void unilateral order, as a matter of law. If the statute as a whole be assumed to be unconstitutional, which is the basis upon which this case is presently to be argued, then the Tax Court provision drops entirely out of the case.

Appellee states (p. 15):

> "Whether a decision by the Tax Court is judicially reviewable, and what issues, if any, would be foreclosed by its judgment, is not before this Court or pertinent to a consideration of the instant case."

We have looked in vain throughout appellee's brief for any authority to support such an unsound principle of law. This contention is not only contrary to fundamental principles of justice; contrary to numerous decisions of this Court, but as well, contrary to the advice given the Senate Finance Committee by the learned Assistant Attorney General who argued this case in the Court below. At pp. 1036-1037 and 1041-1045 (Hearings before the Committee on Finance, Revenue Act of 1943, United States Senate, 78th Congress, First Session, on H. R. 3687), he plainly advised that Committee that the Tax Court provision very probably was unconstitutional, as a denial of due process. Nothing is to be gained by a consideration of the meager and incomplete legislative history of the statute, quoted by appellee pp. 16-18, because the meaning of the statute is plain. The statute plainly makes the determinations of the Tax Court final and conclusive and specifically denies the right of judicial review on such questions as are provided to be within the jurisdiction of the Tax Court, although such questions may involved, as they do here, the repudiation of valid contracts, the taking of appellant's property, and the delegation to executive officers of the right to repudiate existing valid contracts and to pay for the property covered by these contracts, such prices as they, in their uncontrolled opinions, see fit. This, of course, is in the teeth of such decisions as *United States* v. *New River Collieries Co.*, 262 U. S. 341 (1922), and *United States* v. *Bethlehem Steel Corporation, et al.*, 315 U. S. 289 (1942).

However since appellee places some reliance on the views of Congressman Disney, we venture to quote him (89 Congressional Record 10026 at 10251) "I do not believe there is a lawyer in this house but will agree that the retroactive application of existing law is unconstitutional."

The cases cited by appellee at p. 20, are no doubt familiar to this Court. *Pittsburgh & C. Ry.* v. *Board of Public*

Works, 172 U. S. 32; *First National Bank* v. *Weld County*, 264 U. S. 450, and *Gorham Mfg. Co.* v. *State Tax Commission*, 266 U. S. 265, are tax cases involving excessive assessments and with a statute providing for a court review, and as is pointed out in *Pittsburgh & C. Ry.* v. *Board of Public Works, supra*, at p. 39, a court of equity will not ordinarily enjoin in a tax case because of the settled public policy of not interfering with the collection of revenue.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210, and *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, were railroad rate cases. However, in *Prentis* v. *Atlantic Coast Line, supra*, at p. 231, the late Mr. Justice Holmes pointed out:

> "If the state has bound itself by contract not to cut down the rates as contemplated, there would seem to be no reason why the suit should not be entertained now."

The bills in equity were retained in that case to await the outcome of an appeal to the State court on the basis of comity.

Peterson Baking Co. v. *Bryan*, 290 U. S. 570, involved a state regulation of bakers which, it was claimed, was unreasonable, a fact question, but the Court nevertheless passed upon the constitutional questions. *Porter* v. *Investors Syndicate*, 286 U. S. 461, involved the revocation of a permit under a State Blue Sky Law which authorized a court proceeding to set aside the order, but this Court said at p. 471:

> "But where either the plain provisions of the statute * * * or the decisions of the state courts interpreting the act * * * precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal juris-

diction exist, recourse to a federal court of equity is justified."

The language is apposite here because the Renegotiation Act plainly (Section 403(e)(1)) precludes a stay of appellee's unilateral order and once appellant's funds go into the Treasury, it is without a remedy as the statute does not provide for a refund and we have been unable to find any authority for a refund by implication, as suggested by appellee (footnote 35).

Numerous cases are cited at p. 21 for the proposition that a failure to proceed in the Tax Court bars appellant. We have examined these cases with care and we submit, that instead of supporting the above stated proposition, they support our contention that the Tax Court provision is unconstitutional because it fails to provide standards and for judicial review.

Thus this Court says in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 at 48:

> "The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the ap-

propriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.

"As was said in National Labor Relations Bd. v. Jones & L. Steel Corp., 301 U. S. 1, 46, 47, the procedural provisions 'do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.'"

The Court will look in vain through this statute for any provision even approximating such safeguards.

Newport News Co. v. *Schauffler*, 303 U. S. 54, is decided on the basis of the *Myers* case.

In *State of California* v. *Latimer*, 305 U. S. 255 (1938), the Board could not enforce its orders except by resort to legal proceedings.

In *Federal Power Commission* v. *Metropolitan Edison*, 304 U. S. 375, the Commission had to apply to Court to enforce its orders for the production of books, etc.

In *Petroleum-Exploration Co.* v. *Public Service Commission*, 304 U. S. 209, the statute contained "detailed provisions for hearings and judicial review" (p. 223).

In *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, the appellant there was not a party to the proceeding in the Court below, but this Court pointed out (p. 310) that if the Commission had refused to suspend the operation of penalties, resort to the courts would have been justified.

Miles Laboratories v. *Federal Trade Commission*, 140 F. (2d) 683, Cert. denied Feb. 26, 1945, is of no help here because the orders of the Commission are subject to court review.

The argument of appellee (pp. 22 and 24) that had appellant gone to the Tax Court that Court might have found that appellant realized no excessive profits at all or might have fixed such profits at an amount which appellant would have been willing to refund, entirely overlooks the fact that appellant is not complaining about the amount from a factual standpoint. It also overlooks the constitutional objections, one of which is that the Tax Court is given an unbridled administrative discretion to determine excessive profits according to their individual opinions, without any standards, and in addition, the Tax Court may "finally" "increase" the amount, and review of such a finding is forbidden. (Section 403(e)(1).)

We know of no case requiring a further administrative proceeding under such circumstances and we further submit, that if it were compulsory to exhaust such a procedure, the statute would be unconstitutional.

Moreover, if by a remote chance the amount is lowered, what benefit is that to appellant, if in the meantime its

funds go into the Treasury with no statutory provision for a refund or interest? Of course appellant is not to be compelled, if its constitutional rights are to be protected, to take any such risk where the right to judicial review is absolutely forbidden. We are not aware of any inherent right of judicial review as appellee argues. As we understand the law, if a statute taking property rights does not provide for judicial review, it is unconstitutional and an order thereunder is subject to injunctive restraint, which is exactly what we are seeking here.

We fail to see the relevancy of *Blair v. Oesterlein*, 275 U. S. 220, in the case at bar. As appellee states, the question in that case was as to the jurisdiction of the Court of Claims in a tax refund case. The controversy was over a special assessment which the Commissioner of Internal Revenue was authorized to grant or refuse under the Revenue Act of 1918 and which was committed by the statute to his sole discretion. If the Commissioner saw fit not to grant relief to the taxpayer, that was the end of the matter, at least in the absence of fraud or other irregularities. The same observating applies to *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551 and *Heiner v. Diamond Alkali Co.*, 288 U. S. 502. *United States v. Henry Prentiss & Co.*, 288 U. S. 73. The taxpayer was not entitled to relief as a matter of right. The taxpayer must depend on government grace for such concessions and necessarily takes them with all annexed conditions. Such a situation is a far cry from the arbitrary taking of property from citizens on contracts entered into years before the enactment of a statute, which, in part, is the situation here.

We also venture to quote the late Mr. Justice Brandeis in answer to the elaborate argument made by appellee on the supposed necessity of preserving uniformity, and hence the requirement of resort to the Tax Court. In *Great*

Northern Railway v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), that learned Justice said for this Court at p. 290:

> "The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests, in the main, upon the following argument. The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or Federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity the true construction must, in case of dispute, be determined by the Commission.
>
> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute."

In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, Mr. Justice Brandeis said for this Court, at p. 562:

> "But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

We might also add that it does not require any special skill to determine the dates of contracts, the dates of deliveries

thereunder, and whether they had been paid for prior to April 28, 1942.

At pp. 27-28, appellee's argument reverts to the contention that the Tax Court provision is constitutional. Contentions that Congress did not exceed its authority nor provided a defective remedy are obviously constitutional issues. We are precluded from arguing constitutional issues, but our silence on many of such points urged by appellee is not to be construed as an admission of their validity.

Rather belatedly and somewhat vaguely, appellee concedes (p. 34) the constitutional defects in the Tax Court provision of the Renegotiation statute. We do not concur, however, in the view that the separability clause in the statute "* * * in effect announces that the Tax Court determination shall be final and reviewable only to the extent the Constitution permits it." This view suggests judicial legislation. It is another way of saying that the statute is fatally defective constitutionally, but it can be rescued by reading into it an inherent right of judicial review instead of recognizing the well-settled principle that without the right of judicial review, the statute here is unconstitutional.

We also submit that appellee's concession (p. 34) "Furthermore, it [the Tax Court's determination] does not apply to any other issues as to which a person aggrieved by a renegotiation order may constitutionally be entitled to a judicial hearing" plus the concession at 27-28, admits what we are contending for. What would we ascertain by going to the Tax Court, as we are not contesting from a factual standpoint the unilateral finding on the amount of excessive profits? Should we go there to have it tell us it has no jurisdiction to pass on constitutional issues? We think this is for a Court. Further elaboration on this point will be found in our main brief, pp. 29-37.

We find nothing in *St. Louis-San Francisco Railway Co.* v. *Alabama Public Service Commission*, 279 U. S. 560; *Lawrence v. St. Louis-S. F. Ry. Co.*, 274 U. S. 588; and *Locketry* v. *Phillips*, 319 U. S. 182 (p. 35), to sustain the proposition that by going to the Tax Court appellant may not be held to have waived its constitutional right of judicial review. Furthermore, we repeat, we are not raising any issue as to any matter within the jurisdiction of the Tax Court.

The Renegotiation Act is not, by any stretch of the imagination, a regulatory act as appellee argues (p. 36). It is a price-fixing statute under which the Congress has attempted to delegate to executive officers the right to finally and conclusively say what, in their unrestrained opinions, shall be paid for appellant's property, and this without regard to whether the property was acquired by contracts entered into long before the Act and without any standards of any nature. Again a constitutional issue is injected because, we submit that the statute is in the teeth of numerous cases in this Court. In *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349, where this Court reviewed many of the cases it said at p. 368:

> "Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause." [Just compensation clause.]

The language of this Court in *Bowles* v. *Willingham*, 321 U. S. 503 at p. 514:

> "There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases"

very aptly describes the 1942 Renegotiation Act. In *United States* v. *Bethlehem Steel Corp. et al.*, 315 U. S. 289, this Court, in effect, held such a statute was void.

The right to just compensation is guaranteed to appellant by the Fifth Amendment, and this includes full legal interest as damages, and is a matter for judicial and not for final executive determination. A refund is not the equivalent of this constitutional right. Here the language of *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 at 489, is quite in point:

> "Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. * * * (Citing cases.) And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking. * * * (Citing cases.)
>
> "The Congress recognized this duty in authorizing the expropriation. The Act of June 15, 1917, under which the requisition was made, provided for the payment of just compensation. The Congress did not attempt to give to any officer or administrative tribunal the final authority to determine the amount of such compensation and recovery by suit against the United States was made an integral part of the legislative plan of fulfilling the constitutional requirement."

The same result obtains if the problem is approached from the standpoint of a repudiation of appellant's contracts. The appellee ignores the fact that a substantial part of the property involved in the so-called renegotiation proceeding, in this case, was acquired by the United States under contracts entered into in 1940, 1941 and 1942, prior to the date of the statute and the amendments thereto, and in material part, not within the statute at all, because

the contracts were completed and paid for prior to the date of the statute (R., 9-10).

Crozier v. *Krupp*, 224 U. S. 290, and *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, are cited for the proposition (note, p. 39) that in determining jurisdiction the Court may take into consideration all the facts properly before the Court. These cases do not so decide. Neither was decided on a motion to dismiss. This Court held in *Polk Co.* v. *Glover*, 305 U. S. 5, that a motion to dismiss must be decided upon the basis of the facts averred in the complaint and that the answer and affidavits could not be considered. In the *Crozier* case, a statute was passed pending the disposition of the case, taking the patent under the power of eminent domain and vesting exclusive jurisdiction in the Court of Claims to determine the question of just compensation. This is hardly parallel on its facts to the case at bar. A similar result obtained in the *Alaska S. S. Co.* case where a statute was passed after the litigation was instituted rendering the controversy moot. These cases do not even remotely touch upon the question of what facts are to be considered in passing upon a motion to dismiss, which is the question here. In *Gibbs* v. *Buck*, 307 U. S. 66, this Court said at p. 76:

> "The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill."

A case directly in point is *Magruder* v. *Water Users' Association*, 219 F. 72 (C. C. A. 8th) (1914), where that Court said at p. 78:

> "Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such

as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts. If the acts of the defendants done and threatened were authorized by law; they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts. It is a suit to enjoin officers of the United States from unlawfully interfering with and diverting its water from those persons lawfully receiving and entitled to receive it, from unlawfully preventing the United States from discharging its duties and performing its contracts, to the irreparable injury of the plaintiff and its shareholders. That an executive officer is committing or about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is a good cause of action against such officer for injunctive relief. A suit against him for such a cause is neither a suit against the United States nor is it, or the injunction against such acts of the officer, objectionable either on the ground that it interferes with the property of the United States, or its possession, or compels the specific performance of its contracts by the latter." (Citing numerous cases.)

The appellee urges that appellant has an adequate remedy at law in the Court of Claims. The rule is that appellant must have a plain, adequate and complete remedy at law. Whether this comprehends a proceeding in the

Court of Claims is questionable. Appellee has doubts about the validity of this proposition because at p. 27 he states:

> "And it is by no means clear that if denied relief here, appellant may not obtain it in the Court of Claims."

The attempt to use *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (p. 41), as supporting the contention that appellant has a remedy at law is a bit novel. In that case, this Court dismissed a proceeding in equity for an injunction, involving one plaintiff and one defendant, on the ground that there was no case or controversy, that plaintiff there was seeking merely an advisory opinion, that plaintiff, a licensor of a patent, having sued the licensee for the royalty at law if defendant plead the Royalty Adjustment Act of 1942 as a defense, the constitutionality could be there determined. If the licensee paid the Government and the statute was declared unconstitutional, obviously the licensor was not hurt because it could always recover on its contract with the licensee. Moreover, the statute provided a remedy against the United States in the Court of Claims and, what is more important prohibited the licensor from proceeding elsewhere, while guaranteeing just compensation and not such an amount as in the opinion of executive officers should be allowed. In addition, this Court pointed out that if appellee there was not enjoined, there was no complaint that it would pay the royalties involved into the Treasury. In the case at bar, the appellee is bound to do this by the statute (Section 403(c)(2)).

A serious misstatement occurs at p. 43 of appellee's brief, where it is stated:

> "The renegotiation order of March 4, 1944 was issued by him [appellee] as Under Secretary of the Navy pursuant to an Act of Congress (R. 5-6) and his direc-

> tion to the Treasurer of the United States to withhold from appellant monies in the Treasury which would otherwise be due from the United States were obeyed because Forrestal was acting as a Federal official, with statutory authority to hold up payments out of the United States Treasury."

The same erroneous statement is, in effect, made on p. 44.

No such directions were given by this appellee so far as this record shows and we do not understand appellee to say that he violated the stipulation which plainly provides (Paragraph 2, R. 17-18) that upon the deposit by appellant of its vouchers as security—

> "In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in Paragraph 1."

The use of *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 and *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 and *Smith* v. *Reeves*, 178 U. S. 436 by appellee (pp. 46 and 48) demonstrates how far afield appellee has gone in search for a semblance of authority for his position. As this Court points out in its opinion in the *Read* case, p. 50, and in the *Ford* case, these cases are suits for refunds against State officers in their official capacities under statutes prescribing the terms upon which the States agreed to be sued. Sovereign immunity could not have been claimed for individual wrongdoing. This Court held that the consent to be sued was not broad enough to include suits in the Federal Court. Certainly these cases are not authority for the proposition that the case at bar is a suit against the United States.

The use of the language (pp. 46-47) from *Goltra* v. *Weeks*, 271 U. S. 536 is somewhat astonishing to us. The Court

there said the action of the Circuit Court of Appeals in dismissing a bill granting an injunction enjoining the illegal action of the defendant, Secretary of War, who had seized boats of the plaintiff therein, on the ground that the United States was a necessary party, was in error. The language of the Court is so applicable here, we venture to quote the entire paragraph from which the quotation has been lifted. This Court said at p. 546:

> "The suit [Wells v. Roper, 246 U. S. 335] was a bill in equity to enjoin the Postmaster General from annulling the contract and interfering between the United States and the plaintiff in the performance and execution of the contract. The bill was dismissed on the ground that it was a suit against the United States. That which the bill sought to restrain was not a trespass upon the property of the plaintiff. The automobiles of the plaintiff were not to be taken away from him by the government officer. What the officer was doing was merely exercising the authority entrusted to him by law for the benefit of the government in annulling a contract which involved no change of possession or title to property. To enjoin the officers' action was in effect enforcement by specific performance of a contract against the United States. It was an affirmative remedy sought against the government which though in form merely restrictive of an officer was really mandatory against the sovereign. The difference between an injunction against the illegal seizure of property lawfully posessed and against the cancellation of a contract which involved no change of possession is manifest."

Appellee argues (pp. 44-45) that the effect of the stipulation between the parties was to eliminate the threat of seizure of funds in the hands of appellant's subcontractors. Appellee's contention is, in effect, that if in an injunction proceeding an injunction bond is given to preserve the status

quo, pending the litigation, the need for injunctive relief is thereby eliminated, which, of course, is not the law.

Appellee urges (notes, pp. 42 and 48) that *Educational Films Co.* v. *Ward*, 282 U. S. 379 and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 are not in point here because in those cases "the taxpayer was attempting to enjoin collection of money lawfully in his possession." These cases involved injunctions issued against the collection of illegal taxes and in Rickert Rice Mills, the fund, as in this case, the vouchers in effect, was deposited in escrow, subject to the order of this Court. However, although we deny that the case at bar in any way involves the payment of money to appellant, we venture to point out that in *Osborn* v. *Bank*, 9 Wheat. 738 and *Fox* v. *Standard Oil Co.*, 294 U. S. 87, the money was in the hands of officials who were going to turn it into the State treasury unless restrained. In both *R. F. & P.* v. *McCarl*, 62 F. (2d) 203 and *Noce* v. *Morgan Co.*, 106 F. (2d) 746, the money was to come from the United States Treasury. In *Miguel* v. *McCarl*, 291 U. S. 442 (1934), this Court said at p. 455-456:

> "The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. * * * the mandatory injunction to Coleman [Chief of Finance] should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Controller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes."

The test is not, we suggest, whether the funds come out of the United States Treasury, but whether the Court would be called upon, in order to grant relief, to require an appropriation by Congress, which is beyond the authority of the Court. *Robinson* v. *Deal*, 145 F. (2d) 382 (App.

D. C.) (1944). Cert. denied Feb. 26, 1945. Such is not the situation in the case at bar. We repeat, that if appellee is not enjoined, the property of appellant will be confiscated.

Conclusion

It is submitted that appellee has not shown any valid reason for sustaining the order of the Court below which should therefore be reversed and appellant afforded an opportunity of establishing its facts and presenting its constitutional arguments.

Respectfully submitted,

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No. 71

In the Supreme Court of the United States

OCTOBER TERM, 1945

MINE SAFETY APPLIANCES COMPANY, APPELLANT

v.

JAMES V. FORRESTAL

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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v.

JAMES V. FORRESTAL

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinions of the District Court of the United States for the District of Columbia (R. 54–62) are reported in 59 F. Supp. 733, 737.

JURISDICTION

The judgment of the District Court was entered on April 9, 1945 (R. 63). The petition for appeal was presented on May 1, 1945 (R. 64), and allowed on the same day (R. 67). The case was docketed in this Court on May 12, 1945. On June 11, 1945, this Court entered an order noting probable jurisdiction (R. 71–72).

Jurisdiction of this Court is asserted to be based on Section 3 of the Act of August 24, 1937 (c. 754, § 3, 50 Stat. 752; 28 U. S. C. 380a).

QUESTION PRESENTED

Whether the court below erred in dismissing for want of jurisdiction this suit by a Government contractor seeking (1) to enjoin the Secretary of the Navy from withholding monies in the Treasury of the United States otherwise due to the contractor but determined by the Secretary to be the amount of excessive profits returnable to the United States by the contractor under the Renegotiation Act, and (2) to have that Act declared invalid.[1]

STATUTE INVOLVED

The Renegotiation Act is set forth in a separate pamphlet (Appendix A) filed with this brief, and entitled "The Renegotiation Act."

STATEMENT

This is an appeal from a judgment of a specially constituted three-judge court, convened pursuant to Section 3 of the Act of August 24, 1937 (28 U. S. C. 380a), dismissing a suit by appellant, Mine Safety Appliances Company, to re-

[1] The order of this Court dated June 11, 1945, noting probable jurisdiction, stated: "Counsel are requested to discuss in their briefs and on oral argument the questions whether this is a suit against the United States and whether the complaint states a cause of action in equity. The Court does not desire to hear argument upon any other question not passed upon by the District Court. Counsel will be free to discuss in their briefs and upon oral argument the failure of appellant to proceed before the Tax Court as provided in Section 403 (c) of the Renegotiation Act of 1942 as amended, 50 U. S. C. app., Supp. IV, sec. 1191 (c)." (R. 71–72.)

strain appellee, James V. Forrestal, from withholding monies otherwise due appellant, but determined by the appellee, as Under Secretary of the Navy, to be excessive profits returnable by appellant to the United States pursuant to an order issued under the Renegotiation Act.[2]

The following facts are either alleged in the complaint or undisputed in the record:

Appellant Mine Safety Appliances Company, a Pennsylvania corporation, entered into a number of contracts with the Navy Department and with its contractors for the manufacture of supplies or materials needed for the prosecution of the war (R. 1, 13). By order dated March 4, 1944, appellee James V. Forrestal as Under Secretary of the Navy, acting under a delegation of authority from the Secretary of the Navy, found and determined (R. 3, 5–6, 26) that excessive profits of $4,950,000

[2] The original Renegotiation Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942 (56 Stat. 226), and was amended by the Revenue Act of 1942, approved October 21, 1942 (56 Stat. 798), the Military Appropriations Act, 1944, approved July 1, 1943 (57 Stat. 347), the Act of July 14, 1943 (57 Stat. 564), and the Revenue Act of 1943, approved February 25, 1944. The amendments in the Revenue Act of 1943 were in general made effective only with respect to fiscal years ending after June 30, 1943, and these are not here relevant. However, the *de novo* review of renegotiation orders by the Tax Court, added by the Revenue Act of 1943, was made applicable to prior fiscal years, including those covered by the order here involved (see Sec. 403 (e)). The pertinent provisions of these statutes are collected in Appendix A, separately printed and filed with this brief.

had been realized by appellant during 1941 and 1942 under contracts and subcontracts subject to the Renegotiation Act, which directs the Secretary of the Navy, *inter alia*, to determine whether excessive profits have been realized under war contracts and subcontracts and to take steps to eliminate such profits. (Secs. 403 (a) and (c); see Appendix A, pp. 6, 8–9.)[3] That order notified apellant that if it did not voluntarily take action on or before March 8, 1944, "to eliminate said excessive profits" less certain tax credits, appellee Forrestal would take "appropriate action" to do so by "directing the withholding of amounts otherwise due to you as a contractor or subcontractor by the Government and by contractors" (R. 6).[4]

On March 8, 1944, appellant instituted this suit

[3] Prior to the order, meetings and hearings were held between appellant's representatives and the Navy Price Adjustment Board for the purpose of determining the amount of excessive profits, if any, realized by appellant on war business during 1941 and 1942 and looking towards a voluntary agreement for the elimination of any such profits, but no agreement was reached (R. 20–26). The sum of $4,950,000, determined by the Secretary to be excessive profits, consisted of $550,000 for 1941 and $4,400,000 for 1942, without taking into account the applicable tax credits permitted by Sec. 403 (c) (3) of the Act (see Appendix A, p. 10). These credits were subsequently computed to total $3,935,126.22, thus leaving a net refund of $1,014,673.78 due to the United States under the Renegotiation Order of March 4, 1944 (R. 48–49).

[4] Section 403 (c) (2) of the Renegotiation Act authorizes and directs the Secretary to eliminate excessive profits "(i) by reductions in the contract price of the contract or subcontract * * *; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount

(R. 1–17) in the District Court of the United States for the District of Columbia, to enjoin Frank Knox, then Secretary of the Navy, and appellee Forrestal, then Under Secretary of the Navy, from (1) "Withholding or instructing or requesting the United States, or any instrumentality, agency, officer, or agent [thereof] to withhold any monies due, or to become due to [appellant] from the United States or any agency or instrumentality thereof;" (2) "Instructing or requesting any prime contractor or subcontractor * * * to withhold any monies due or to become due to" appellant; (3) "further proceeding * * * to renegotiate * * * contract prices" for appellant; and (4) "proceeding in any manner * * * to enforce the determination and order of March 4, 1944" (R. 16).[5] The complaint alleged that the injunctive relief was sought "primarily" on the ground that the Renegotiation Act and the Secretary's order thereunder

of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable." (Appendix A, p. 9.)

[5] After this action was commenced, Knox died and Forrestal was appointed Secretary of the Navy (R. 36–37). The court below thereafter entered an order substituting Forrestal as the sole defendant (R. 37–38). He will herein be sometimes referred to as the "Secretary."

were invalid (R. 3), but it averred, as additional grounds for relief, that appellant realized no excessive profits in 1941 and 1942 (R. 11), and that the Secretary's order included contracts not subject to renegotiation (R. 9–10). The complaint also sought a declaratory judgment that the Renegotiation Act is unconstitutional and unenforceable against appellant (R. 16–17).

On March 9, 1944, the parties stipulated that the Secretary "will cause the Navy Department to suspend payments, pending the final determination of this action by the Court of last resort, of vouchers otherwise payable by the Navy Department" to appellant "up to the sum of $1,050,000 (subject to adjustment upon further calculation by the Navy Department), for the purpose of securing payment to the United States of the amount as determined by the Under Secretary of the Navy to be excessive profits as appears from his written determination of March 4, 1944;" that the Secretary will take no other action to enforce the order of March 4, 1944, or to eliminate the excessive profits pending final determination; and that appellant will not apply for any injunctive relief pending final determination (R. 17–18).

After the Secretary filed an answer to the complaint (R. 18–34), a special three-judge court[6] was designated at appellant's request, by the Chief Justice of the United States Court of Appeals for

[6] Consisting of Circuit Justice Miller and District Justices Bailey and McGuire, all of the District of Columbia.

the District of Columbia pursuant to Section 3 of the Act of August 24, 1937 (R. 35–36).

On December 9, 1944, the Secretary moved to dismiss the complaint on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim against him upon which relief could be granted (R. 41).[1] In support of the motion, the Secretary filed an affidavit (R. 41–46) in which he stated, inter alia, that he had theretofore determined that $1,014,873.78 was the final net amount of refund due the United States under his excess profits determination of March 4, 1944, after allowance of tax credits (R. 45); and that such sum, as to which payment was suspended pursuant to the aforesaid stipulation—

> is being held as an obligated but unexpended balance in the particular appropriation accounts of the Navy Department applicable to the various contracts with [appellant]. The result is that such total of suspended payments is being held by the Treasury of the United States as an unexpended portion of money appropriated by the Congress to the Navy Department or allocated to it by another Department or agency * * *.
>
> * * * such money is being so held, pending the outcome of the suit, and will

[1] In the alternative, the Secretary moved for summary judgment on the grounds that there was no genuine issue as to any material fact and that he was entitled to a judgment as a matter of law (R. 41).

> continue to be carried in the proper appropriation accounts on the books of the Treasury subject to applicable statutory limitations. If [appellant] is unsuccessful in this suit, such money will immediately be transferred, on the books of the Treasury, from the appropriations available to the Navy Department to miscellaneous receipts of the Treasury. The amount of payments suspended will satisfy [appellant's] liability for excessive profits under the Renegotiation Act for its fiscal year 1941 and 1942. (R. 46).

On April 9, 1945, the court below entered a judgment dismissing the complaint for want of jurisdiction (R. 63) on the ground that the suit was one against the United States (R. 54–62).[3] Appellant has brought that judgment here by an appeal (R. 64–72).

SUMMARY OF ARGUMENT

1. Appellant, considering itself aggrieved by the determination of the Secretary that it had realized excessive profits under the Renegotiation Act, at once applied to the court below for injunctive and declaratory relief, disregarding the statutory remedy—the Tax Court—provided by the Congress for the redetermination of excessive profits. Whatever the finality of a Tax Court determina-

[3] The opinion of the court was written by Justice McGuire and concurred in by Justice Miller (R. 54, 62). Justice Bailey wrote a separate "concurring opinion" in which the other two Justices joined (R. 62).

tion, it is plain that Congress intended that persons aggrieved by renegotiation orders should seek initial, if not final, relief in the Tax Court and not in the equity courts. The legislative materials underlying the Tax Court remedy plainly show that Congress considered and rejected District Court review of renegotiation determinations, and instead selected a single "exclusive" forum for the *de novo* determination of all questions relating to amount. The Tax Court's jurisdiction, which would cover all questions raised by appellant in its complaint below other than the validity of the Act itself, precludes the granting of injunctive or declaratory relief by a federal court of equity.

The mere availability of the Tax Court remedy, wholly apart from the "exclusive" nature of its jurisdiction, requires that appellant exhaust it before seeking relief in a court of equity. If appellant had taken its complaint to the Tax Court instead of to an equity court, as Congress intended, its controversy with the Government might have ended in appellant's favor, rendering moot the issue as to the validity of the Renegotiation Act. Appellant may not evade the obligation to exhaust the administrative remedy by charges that the underlying statute is unconstitutional; and the federal courts will not decide constitutional questions if full relief could be had on less critical issues. For like reasons, declaratory relief is not available to appellant. See *Alabama*

State Federation of Labor, Local Union No. 103 v. *McAdory*, No. 588, October Term, 1944, decided June 11, 1945.

The finality of Tax Court determinations is likewise no excuse for appellant's disregard of that remedy. Similar provisions have been sustained by this Court in comparable legislation dealing with excessive profits (*Williamsport Co.* v. *United States*, 277 U. S. 551), but it is in fact immaterial whether and to what extent Tax Court determinations are not judicially reviewable, since the invocation of its jurisdiction might give appellant all the relief it claims. *First National Bank* v. *Weld County*, 264 U. S. 450. In any event appellant is entitled in a subsequent available remedy at law to judicial review of the constitutionality of the Renegotiation Act, and may also obtain judicial review of any other issues which he is constitutionally entitled to have so decided (*Crowell* v. *Benson*, 285 U. S. 22; see Sec. 403 (g) of Renegotiation Act (separability clause)).

2. By stipulation between the parties the elimination of appellant's excessive profits under the Secretary's order is being effectuated solely by withholding from appellant an equivalent amount of monies otherwise due it from the United States under Government contracts. Appellant's prayer for an injunction against such withholding is thus in effect an attempt to obtain money from the United States Treasury as a general creditor

against whose claim the United States has set-off an equivalent amount alleged to be due to the United States under the Renegotiation Act. If the Act is invalid, the set-off is improper, and appellant has an adequate remedy at law in the Court of Claims to recover the amount due it under its contracts. In such a suit, the Government's defense that the set-off is justified under the Renegotiation Act will enable appellant to obtain a decision as to the validity of the Act and of any other questions not precluded by his failure to apply to the Tax Court. The availability of the adequate remedy at law prevents the exercise of equitable jurisdiction, particularly where the validity of an Act of Congress is sought to be made the turning point of the case. See *Goffman v. Breeze Corporations, Inc.*, 323 U. S. 316.

3. The suit seeks, in effect, to compel the payment of monies to appellant out of the United States Treasury by eliminating the only bar to such payment, thus specifically enforcing the contract between appellant and the United States. It is therefore a suit against the United States, to the maintenance of which in the present forum Congress has not consented.

ARGUMENT

Under the Renegotiation Act the Secretary of the Navy is "authorized and directed" to "renegotiate" and to "eliminate any excessive

profits" realized on contracts and subcontracts subject to the Act (Sec. 403 (c) (1) and (2); Appendix A, pp. 8–9). Proceeding under that statute, the Secretary determined that appellant had realized "excessive profits" of about $1,000,000 on renegotiable business and required that these be refunded or otherwise eliminated. Appellant refused to comply.

The Act authorizes and directs the Secretary "to eliminate any excessive profits" by several methods (Sec. 403 (c) (2); see n. 4, *supra*), but by stipulation with appellant (R. 17–18), the Secretary has agreed to eliminate the excessive profits solely by directing the withholding of an equivalent amount from amounts otherwise due to appellant on certain contracts with the United States. The sum thus withheld is being retained in the Treasury of the United States, credited upon its books to the Navy Department's account; the final elimination of the excessive profits will merely require the transfer of this amount upon the Treasury's books from the Navy account to miscellaneous receipts.

The Act, as amended prior to this suit, provides that any "contractor or subcontractor * * * aggrieved by a determination of the Secretary * * * as to the existence of excessive profits, * * * may, within ninety days * * * after the date of such determination, file a petition with the Tax Court of the United States for a redetermination thereof," and further that

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency. (Sec. 403 (e); Appendix A, pp. 37-39.)

Ignoring the Tax Court, appellant has brought this suit to enjoin the Secretary from withholding any money due to appellant "from the United States", and to declare the Act invalid and unenforceable against appellant (R. 16–17). As grounds for injunctive relief appellant urges "primarily" (1) that the Act is unconstitutional (R. 3, 11–13), but also that the Secretary's renegotiation order is in error (2) in finding that appellant had realized any excessive profits (R. 11) and (3) in including within its computation contracts not properly subject to the Act (R. 6, 9–11). We submit that the dismissal of the suit by the court below is proper for at least three reasons:

1. Appellant failed to apply for relief to the "exclusive jurisdiction" of The Tax Court, which might have decided that there were no excessive profits and thus ended appellant's controversy with the Government. Its failure to exhaust the administrative remedy is fatal to the grant of any relief by an equity court.

2. If appellant, despite its disregard of the Tax Court remedy, is entitled, as a matter of statu-

tory interpretation or constitutional right, to a judicial decision as to the validity of the Act or the renegotiation order, or as to any other issue raised thereby, such a decision can be had and full relief granted in the Court of Claims *via* a suit for the money withheld from appellant under contracts with the United States. The adequacy of the remedy at law precludes equitable relief here.

3. While this is nominally a suit against Forrestal, the relief sought—an injunction against the "withholding" of monies due to appellant from the United States under Government contracts and a declaration that the Act underlying the withholding is unconstitutional—makes the action one against the United States. Congress has not consented to such a suit.

I

Appellant Failed to Exhaust the Statutory Remedy for the Redetermination of Excessive Profits

Appellant, considering itself aggrieved by the determination of the Secretary that it had realized excessive profits of some $1,000,000, at once applied to the court below for injunctive and declaratory relief, spurning the procedure provided by Congress for the redetermination of renegotiation orders in the Tax Court. Such premature resort to judicial process is not only directly contrary to the Congressional intendment, but is "at

war with the long settled rule of judicial administration" requiring exhaustion of the statutory remedy before applying to the courts for equitable relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51.

A. THE "EXCLUSIVE JURISDICTION" OF THE TAX COURT

Section 403 (c) of the Renegotiation Act (Appendix A, pp. 37–39) gives the Tax Court "*exclusive jurisdiction* * * * to finally determine the amount, if any, of such excessive profits," and provides that its "determination shall not be reviewed or redetermined by any court or agency." (Emphasis added.)

Whether a decision by the Tax Court is judicially reviewable, and what issue, if any, would be foreclosed by its judgment, is not before this court or pertinent to a consideration of the instant case. The Tax Court has not been asked by appellant to decide and has not decided any aspect of the controversy at hand. The extent to which a judgment of that court can or should be judicially reexamined in view of the directions in the statute that its "determination shall not be reviewed * * * by any court", is not a matter to be decided in the abstract, before a record is made in the Tax Court, and before it is known what issues the Tax Court has been asked to decide, what issues it has decided, and what issues the contractor seeks to have redecided. But what-

ever the finality of a Tax Court decision, it is plain that Congress intended that persons aggrieved by renegotiation orders should seek initial, if not final relief, in the Tax Court, and not in the equity courts. The clear statutory language making the Tax Court's jurisdiction exclusive would without more preclude the exercise of jurisdiction by a district court on any question within the jurisdiction of the Tax Court, and the legislative history eliminates any vestige of doubt on this score.

The Tax Court remedy was not added to the Renegotiation Act until almost two years after its original enactment. The Ways and Means Committee of the House of Representatives, in reporting the bill which provided that remedy, repeatedly emphasized the "exclusive" jurisdiction which the Tax Court would have in redetermining the amount of excess profits. H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76–77, 84–85. In the House, Congressman Disney, a member of the Committee and a sponsor of the provision, justified it as follows:

> The Tax Court was chosen to perform this function for four principal reasons. The first is, that the Tax Court deals with very similar problems under the excess profits tax. The second reason for choosing the Tax Court is the fact that in it judges hold court all over the United States and hence the contractors will not have to come to Washington to be heard by the court.

> The third is that the use of one forum will bring about uniformity in the development and application of principles of decision; and the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits * * *. [89 Cong. Rec. 9929.]

The House passed this provision, but the Senate Finance Committee (S. Rep. No. 627, 78th Cong., 1st Sess., p. 34) and the Senate (90 Cong. Rec. 543), while agreeing that one forum should be given "exclusive" jurisdiction to make a *de novo* review of renegotiation determinations, substituted the Court of Claims for the Tax Court to perform this function (S. Rep. No. 627, 78th Cong., 1st Sess., p. 110). The conferees reinstated the Tax Court (H. Rep. No. 1079, 78th Cong., 2d Sess., p. 84), and the Senate accepted the Conference Report (90 Cong. Rec. 1301). In the House, Congressman Disney pointed out that under both the House and Senate versions, the review of renegotiation determinations—

> is required to be treated as a de novo proceeding in which all questions of fact and law may be decided. The conference report makes no change in this regard * * *. [90 Cong. Rec. 1355.]

Congressman Izac, a member of the conference committee from the House, also commented upon the provisions for "court review," saying:

> We of the Naval Affairs Committee sug-

> gested that they have recourse to the district courts of the land, but disregarding our recommendations it was decided to put it first in the Claims Court, and finally in the Tax Court. [90 Cong. Rec. 1357.]*

The Conference Bill was thereafter accepted by the House (90 Cong. Rec. 1359) and became law.

This background plainly shows that Congress considered and expressly rejected review by the district courts of renegotiation determinations, and instead provided for *de novo* hearing of the question of excessive profits by a single expert tribunal, the Tax Court, in order to "bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929), giving that tribunal "exclusive" jurisdiction extending to "all questions of fact and law" (90 Cong. Rec. 1355).

Whatever room is left for judicial action after the Tax Court makes its redetermination, the foregoing material makes it plain that Congress desired that contractors who complain of a renegotiation order should take their grievance to the

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* The House Committee on Naval Affairs, reporting on the "Renegotiation of War Contracts," had earlier recommended "that the Renegotiation Act be amended so as to provide that, whenever one of the Secretaries has made a unilateral determination, the contractor concerned may obtain judicial review of that determination in the United States District Court in the district in which the contractor maintains its principal place of business, within 60 days after the publication of the unilateral determination." H. Rep. No. 733, 78th Cong., 1st Sess., p. 34.

Tax Court, and not to a court of equity. Appellant seeks to avoid this obvious conclusion by contending that the Tax Court remedy is not mandatory but an "option" or "privilege" which the contractor is free to accept or reject, arguing that if "Congress had intended exclusive jurisdiction in a case of this nature" it would have used the term "shall" file instead of "may" file a petition in the Tax Court for a redetermination (Br., pp. 34–35). This confuses the alternatives which Congress gave to contractors. Obviously, Congress used the permissive "may" because it did not wish to *require* a contractor to seek review; "the alternative afforded by the use of the word 'may' is between seeking relief or submitting" to the Secretary's determination. *Lewis* v. *City of Lockport*, 276 N. Y. 336, 344, 12 N. E. 2d 431, 434.[10] To construe the statute as giving the contractor the alternative of applying to the Tax Court or to some other court, as he might see fit,

[10] Nor does the provision that the Tax Court shall have exclusive jurisdiction "Upon such filing" of the petition, affect the exclusiveness of the remedy. Such phrase is traditionally used in statutes whose effect is to create exclusive jurisdiction. See, e. g., Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. 210; Securities and Exchange Act, 48 Stat. 901, 15 U. S. C. 78y (a); Holding Company Act, 49 Stat. 834, 15 U. S. C. 79x; Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717r (b); Federal Power Act, 49 Stat. 860, 16 U. S. C. 825*l* (b); Food, Drug and Cosmetic Act, 52 Stat. 1052, 21 U. S. C. 355 (h); Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646 (d); Federal Alcohol Administration Act, 49 Stat. 978, 27 U. S. C. 204 (h).

would not only empty the term "exclusive" of content, but would ignore the Congressional desire to achieve a uniformity in principles of decision by entrusting such matters to one Tax Court instead of to a number of district courts. Similar considerations have led this Court uniformly to hold that statutory remedies, no less permissive in form, must be exhausted before judicial review is sought. *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32, 44–45; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229–230; *First National Bank* v. *Wild County*, 264 U. S. 450, 453–455; *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269–270; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575–576; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463."

" In urging that the jurisdiction of the Tax Court is non-exclusive, appellant cites the amendments made by the Revenue Act of 1943, which expressly provide that orders of the War Contracts Price Adjustment Board shall be final if no petition is filed in the Tax Court (Sec. 403 (c) (1); Appendix A, p. 28), but make no like provision for unilateral orders entered by a head of an agency, as here (App. Br. p. 35). This minor discrepancy is readily explained by the fact that these amendments were the fifth in a series of interlocking, piecemeal and urgent wartime measures designed to meet wartime exigencies and to incorporate the progressive lessons of actual experience into a Renegotiation program involving billions of dollars and many thousands of contracts. That a neatly fitting and symmetrical statutory structure was not evolved is occasion neither for surprise nor for reading into accidental differences of language a meaning at odds with the clear Congressional intent.

B. FAMILIAR PRINCIPLES REQUIRING EXHAUSTION OF THE ADMINISTRATIVE REMEDY ARE APPLICABLE HERE

Even if the Renegotiation Act did not in terms make the jurisdiction of the Tax Court "exclusive," appellant's failure to invoke the Tax Court remedy precludes judicial intervention by injunction or declaratory judgment. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Edison*, 304 U. S. 375; *Petroleum Co.* v. *Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300; *Miles Laboratories* v. *Federal Trade Commission*, 140 Fed. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752.

The practical considerations underlying the long-settled rule as to exhaustion of statutory remedies have forceful application to the instant case. Most of the questions raised by appellant in its complaint below can best be determined by the Tax Court, if respect is to be accorded to the congressional objectives of uniformity of decision and expert treatment of complex renegotiation issues. This is true of the allegations in the complaint that "neither factually nor legally is there a basis" for the Secretary's determination of excessive profits on appellant's business in 1941 or 1942 (R. 11); that appellant in its production of certain articles for military use has sacrificed

competitive advantages and made concessions to the Government of approximately $12,000,000, including voluntary price reductions of some $8,700,000 (R. 7–8); that appellant has made available to the United States valuable research data, and technical and manufacturing information (R. 7); that it reduced governmental procurement costs through its efficient operations (R. 8); that its costs and selling prices are the lowest in the industry as related to comparable products (R. 8); that it has risked large amounts of money in the war effort and through contract cancellations has suffered losses and incurred contingent liabilities (R. 11); and that the Secretary improperly included certain of appellant's contracts in the computation (R. 6, 8–10). Had these contentions been presented by appellant to the Tax Court, as Congress intended they should be, that forum could have fully disposed of them, and conceivably might have held that no excessive profits whatever had been realize. This would plainly have given appellant all the relief it needed, and have terminated its controversy with the Government.

The charges in the complaint that the Secretary's determination was arbitrary and that the renegotiation proceeding did not afford appellant due process (R. 8–9, 12–13) do not justify disregard of the available Tax Court remedy. The *de novo* determination which that body is directed to make would render wholly immaterial any de-

fects in the proceedings before the Secretary or in his determination under the Act. And "it is not to be assumed" that if appellant had applied to the Tax Court for a redetermination of the Secretary's order, it would have been denied "any right to which it is entitled." Cf. *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 188.

Appellant attempts to excuse its failure to apply to the Tax Court on the ground that that court would have no authority to pass upon questions as to the scope or application of the Act, or as to its validity (Br. 30–33). It is not necessary for purposes of considering the applicability of the exhaustion doctrine, to decide whether such issues could be determined by the Tax Court, and what effect its decision would have.[12] It is a sufficient answer to appellant's contention that resort to the statutory remedy could provide full relief.

Similar considerations underlie the settled rule

[12] It seems clear that the authority of the Tax Court to redetermine the "amount" of excessive profits would include jurisdiction over issues relating to the scope and application of the Act. A determination of the "amount" of excessive profits realized within the meaning of the Act, a power explicity vested in the Tax Court, must necessarily be preceded by either an assumption or a ruling as to the application of the Act to the contractor or contracts in question. Cf. *Dobson* v. *Commissioner,* 320 U. S. 489, 501; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509. As is pointed out in the petition for a writ of certiorari in *Land* v. *Waterman Steamship Corp.*, No. 435, this Term, approximately 65% of all renegotiation cases pending in the Tax Court raises issues of "coverage."

that a person aggrieved by an administrative order is not relieved of his obligation to exhaust all avenues of relief provided by statute, merely by charging that the underlying legislation is unconstitutional. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51; *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560, 562–563; *Gorham Mfg. Co.* v. *State Tax Commission*, 266 U. S. 265. The reason for the rule is the reluctance of courts to "anticipate a question of constitutional law in advance of the necessity of deciding it," lest there be formulated "a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Cf. *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners*, 113 U. S. 33, 39. Had appellant gone to the Tax Court instead of applying to a court of equity for injunctive and declaratory relief, the Tax Court might have found that appellant realized no excessive profits at all, or might have fixed such profits at an amount which appellant would have been willing to refund. In either of such events, there would be no need for a decision as to constitutionality.[13]

[13] For this reason a three-judge court in the District of Columbia recently refused relief in a similar case, pointing out that if the Tax Court should hold that plaintiff received no excess profits, "the constitutionality of the Act is immaterial so far as the rights of the plaintiff are concerned." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, No. 28999, decided September 28, 1945.

As this Court stated in *White* v. *Johnson*, 282 U. S. 367, 373:

> It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

See also concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346–348, and cases there cited.

For the same reasons, appellant has no standing to seek a declaration under the Federal Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955, 28 U. S. C. 400), that the Renegotiation Act is unconstitutional. The Declaratory Judgment Act "does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin." *Bradley Lumber Co.* v. *National Labor Relations Board*, 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Moreover, declaratory relief lies "only in the sound discretion of the

Court," and in *Alabama State Federation of Labor, Local Union No. 103* v. *McAdory*, No. 588, October Term, 1944, decided June 11, 1945, this Court held that it may not be invoked to test the constitutionality of a state statute in the absence of a "precise set of facts to which it is to be applied" and of "an authoritative construction" by a state court and "before it plainly appeared that the necessity for it had arisen." (Slip sheet opinion, pp. 8, 15.) Here, appellant's failure to apply to the Tax Court has precluded the formulation of a "precise set of facts" to which the Act "is to be applied," and "an authoritative construction" by that court of the Act's application to appellant. Since the Tax Court might have held that appellant had realized no excessive profits, the attempt to obtain a declaration as to constitutionality was made "before it plainly appeared that the necessity for it had arisen."

An exception to the foregoing principles is not justified by the fact that the statutory period of 90 days for petitioning the Tax Court has expired in this case. If the extraordinary processes of equity can be invoked by a litigant who has deliberately stood by while the time to apply for administrative review expired, an easy avenue is opened for wholesale disregard of a congressional scheme of review.[13a] The occasional instances of

[13a] It would also defeat the power that Congress vested in the Tax Court to determine as the amount of excessive profits an amount "greater than that determined by" the Secretary

individual hardship which might result from scrupulous observance of this sound rule of judicial administration are, we suggest, not sufficiently cogent to overcome the requirement of exhaustion of administrative remedy. And it is by no means clear that if denied relief here, appellant may not obtain it in the Court of Claims (see pp. 34-35, 38-42, *infra*).

C. THE PROVISION FOR FINALITY OF TAX COURT DECISION DOES NOT EXCUSE DISREGARD OF THAT REMEDY

Vesting in the Tax Court "exclusive jurisdiction * * * to finally determine the amount, if any, of such excess profits", Congress explicitly announced that "such determination shall not be reviewed or redetermined by any court or agency" (Sec. 403 (e), Appendix A, p. 37). Appellant relies upon that provision as justifying disregard of the Tax Court and resort to equity (Br. pp. 35–36). We submit that this contention is without merit.

We do not believe and make no contention that Congress entrusted to the Tax Court the authority to determine the constitutionality of the Act. But we do maintain that in leaving to that forum the exclusive and final decision of all questions re-

(Sec. 403 (e) (1); Appendix A, p. 37), for litigants, if they have a choice, would always choose a forum, such as a district court, which would be unable to treat them less favorably than did the Secretary.

lating to the amount of excessive profits under the Act, Congress neither exceeded its lawful powers, nor provided a remedy so defective that it might freely be ignored.

This court has sustained a statute which left very similar questions of excessive profits to the final decision of the Board of Tax Appeals, now the Tax Court. The Revenue Act of 1918 (40 Stat. 1057) provided for a special computation of excess profits taxes by the Commissioner of Internal Revenue upon a finding by him that the ordinary computation, owing to abnormal conditions, would work exceptional hardship on the taxpayer. Under the special computation, the tax was the amount bearing the same ratio to the net income of the taxpayer as "the average tax of representative corporations engaged in a like or similar trade or business" bore to the taxpayer's average net income for the year in question. This Court held that the Board of Tax Appeals had jurisdiction to review the Commissioner's action under this provision (*Blair* v. *Oesterlein*, 275 U. S. 220), but thereafter held that Congress did not intend taxpayers to have any court review of (1) the action of the Commissioner in denying a claim for special computation, or (2) his determination as to the rate of tax to be applied in the event of the allowance of a claim for special computation, *Heiner* v. *Diamond Alkali Co.*, 288 U. S.

502; *Williamsport Co.* v. *United States*, 277 U. S. 551. In the latter case it was held that the Court of Claims was without jurisdiction of a suit to recover excess profits taxes assessed and alleged to have been illegally collected under the Revenue Act of 1918, and that the determination of the Commissioner and the Board of Tax Appeals was final. Observing that the "considerations" which demanded special assessment under the Act were "facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information", Mr. Justice Brandeis said (277 U. S. at 561–562):

> Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24 (20) of the Judicial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying de-

> cisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to insure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

These reasons apply with equal force to determinations made by the Tax Court in connection with renegotiations. Congress chose the Tax Court to perform that function because it "deals with very similar problems under the excess profits tax" and because "the use of one forum will bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929). Here, as under the Revenue Act of 1918, a proper determination in a "delicate and complex phase" of administration requires the exercise of expert judgment in the light of accounting practice, industry statistics, and profits allowed or voluntarily accepted under comparable circumstances. The typical renegotiation case requires that due consideration be given to such matters as costs, profits, losses, contingent liabilities, operating efficiency, price policies, war financing, taxes, plant conversion, peacetime earnings, depreciation, amortization, working capital and other concepts familiar to those who admin-

ister or adjudicate the Revenue laws."[14] Because Congress considered the Tax Court to be "peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose," Congress gave it exclusive and final powers of decision. H. Rep. No. 871, 78th Cong., 1st Sess., p. 77.

It is impossible to contend that the Congressional decision was devoid of rational basis, or that Tax Court review of excessive profits under the Renegotiation Act is "incapable of affording * * * due process" to appellant. Cf. *Yakus* v. *United States*, 321 U. S. 414, 435. Congress has in fact been careful to guarantee war contractors as full and as fair a procedure as could be had in any judicial forum. Congress directed that the hearing in the Tax Court (Appendix A, pp. 37–39) is not to be "treated as a proceeding to review" the renegotiation order of the Secretary but "as a proceeding de novo," i. e., without prejudice to the contractor on account of prior determinations of excessive profits within the department. This proceeding would, moreover, be had in a forum

[14] See, e. g., Sec. 403 (c) (3) of the Act (Appendix A, p. 10) which requires that "In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code."

which in the words of this Court "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings" and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. These safeguards of the contractor's rights render of little moment the technical classification of the Tax Court with quasi-judicial agencies in the executive branch rather than with a judicial tribunal like the Court of Claims (see App. Br. pp. 30–31). As this Court observed in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303,

> Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock* [250 U. S. 328].[15]

In any event, the nonreviewability of Tax Court determinations would not excuse the invocation of its jurisdiction since the applicant might there receive all the relief it claims. In *First National Bank* v. *Weld County*, 264 U. S. 450, this Court

[15] See also *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; cf. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536; *Reetz* v. *Michigan*, 188 U. S. 505, 507.

held that a taxpayer's suit to recover taxes paid under protest was not maintainable in a district court where the plaintiff had failed to avail itself of an administrative remedy afforded by State law. Rejecting the contention that resort to that remedy was excused because "no appeal to a judicial tribunal was provided" from the administrative decision, this Court said that it could not "assume that if application had been made to the Commission proper relief would not have been accorded by that body" (264 U. S. at 454–455).

Nor does the Tax Court remedy, exclusive and final within its authorized scope, affect the contractor's right to a judicial decision as to the validity of the Act. As already shown (n. 4, *supra*), a final renegotiation determination as to excessive profits may be enforced only in one or more ways authorized by the Act: (1) reduction in contract price, (2) withholding amounts otherwise due, (3) directing another contractor to withhold amounts otherwise due, or (4) suit to recover. If the Government utilizes the first or second methods of enforcement, the contractor, after he has established the right to apply to a court by exhausting his administrative remedies (see pp. 14–27, *supra*), may sue the United States for the amounts otherwise due under the contracts, and when the United States asserts the renegotiation order as the justification for the reduction or withholding, the contractor may

obtain a judicial decision as to the validity of the Act. If the Government directs a prime contractor to withhold sums otherwise due to a subcontractor (the renegotiated company), the latter may obtain the same decision in a suit at law against the prime contractor because the defendant would be obliged to plead as a defense the renegotiation order and the Government's directions to withhold monies from the plaintiff;[16] and in such a suit, the United States would unquestionably be certified to intervene as a party pursuant to the Act of 1937 (28 U. S. C. 401). If the Government should bring an affirmative suit to recover under the renegotiation order, the defendant may plead unconstitutionality as a defense.

We have conceded (pp. 27–28, *supra*) that the provision in the Act making the Tax Court's determination final as to questions of amount does not apply to decisions as to the constitutionality of the Act. Furthermore, it does not apply to any other issues as to which a person aggrieved by a renegotiation order may constitutionally be entitled to a judicial hearing. This is so because, as is true of all other statutory language, the Tax Court provisions of the Act must be read with the Constitution, and any exceptions and qualifications required by the Constitution must be raised

[16] Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 322–323; *Coffman* v. *Federal Laboratories, Inc.*, 323 U. S. 325, 326–327.

within the statute if its language and the congressional intention do not forbid it. Here, Congress has expressly taken care of such a contingency by adding a separability clause to the Renegotiation Act (Sec. 403 (g); Appendix A, p. 39), which in effect announces that the Tax Court determination shall be final and unreviewable only to the extent that the Constitution permits it. *Crowell* v. *Benson*, 285 U. S. 22, 60–65; cf. *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 169–170. Consequently, the Tax Court provisions of the Act, read in this context, leave a person aggrieved by a renegotiation determination with access to such judicial relief as the Constitution requires. And, contrary to appellant's contention (App. Br., p. 34), its constitutional right of judicial review, whatever it may be, is not waived by proceeding in the Tax Court, but can be invoked in the appropriate court upon completion of the Tax Court proceeding. Cf. *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560; *Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; see also *Lockerty* v. *Phillips*, 319 U. S. 182, 188.[17].

[17] In urging that the Tax Court does not afford it an adequate avenue of relief from the Secretary's excess profits determination, appellant argues that the Renegotiation Act bars any "stay of the unilateral order (Section 403 (e))" and that "there is no certainty of a refund in the event of a favorable determination by the Tax Court" (App. Br., p. 36). But the provision for Tax Court redetermination obviously contemplates a refund of any amount by which the

It is therefore immaterial that the Renegotiation Act, like many other regulatory statutes, makes no provision for the decision of constitutional questions. Indeed, before the Tax Court remedy was afforded by the Revenue Act of 1943, Congress recognized that the forum available for appropriate judicial action would depend on the method chosen by the Government to enforce determinations of excessive profits.[18] Since there "is no constitutional requirement that [the] test" as to the vindication of constitutional rights "be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due

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excess profits determination is reduced by the Tax Court, and Congress has in fact provided for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits." (See p. 42, n. 22, *infra*.) This removes all possibility of injury to an aggrieved contractor who applies to the Tax Court for a redetermination of his excess profits. Cf. *Stratton* v. *St. L. S. W. Ry.*, 284 U. S. 530; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481; *Arkansas Building Association* v. *Madden*, 175 U. S. 269. Even without such a provision, Congress would have a right to prohibit temporary injunctions against the enforcements of administrative orders, at least where an adequate remedy at law is available. Cf. *Lockerty* v. *Phillips*, 319 U. S. 182.

[18] In the 78th Cong., 1st Sess.: Hearings before H. Committee on Naval Affairs, pursuant to H. Res. 30, p. 507; see also Hearings before S. Committee on Finance on H. R. 3687, p. 990; Hearings before H. Committee on Ways and Means on H. R. 2324, 2698 and 3015, pp. 109 and 110; Hearings before the Subcommittee of the S. Committee on Appropriations on H. R. 2996, p. 137.

process" (*Yakus* v. *United States*, 321 U. S. 414, 444), the system of Tax Court redetermination plus judicial review in a further proceeding to the extent constitutionally required is entirely valid.

Appellant's reliance (App. Br., pp. 26, 36) on *Stark* v. *Wickard*, 321 U. S. 288, is misplaced. In that case this Court held that milk producers had standing to enjoin the Secretary of Agriculture from carrying out certain provisions of a milk order allegedly unauthorized under the Agricultural Marketing Agreement Act of 1937, which the producers claimed would have reduced the minimum prices to which they were entitled under the Act. The opinion makes it clear that the result was reached by way of construing the Congressional intention, and not because the Constitution required such judicial relief. Stating that "executive officers may be restrained from threatened wrongs in the ordinary courts *in the absence of some exclusive alternative remedy*" (p. 290), this Court held that although the Act did not specifically grant producers a right to judicial review of the Secretary's action, "the Congressional grant of jurisdiction [to hear the] proceeding appears plain" (p. 307); that "the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy*, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts" (p. 309); and that the Act provided "no forum, other

than the ordinary courts to hear [the producers'] complaint" (p. 309) [all italics supplied].[19]

In the instant case, an "exclusive alternative remedy"—the Tax Court—is "the forum, other than the ordinary courts" provided by Congress to hear appellant's complaints, and a judicial body, the Court of Claims, affords appellant such review in addition to "administrative determinations" as the Constitution may require.

II

Appellant Has an Adequate Remedy at Law

The relief which appellant seeks in this suit is essentially the payment of approximately $1,000,000 due from the United States under contracts with appellant. Its sole grievance is that this money has been withheld in the Treasury at the direction of the Secretary to secure collection by the United States of the amount determined in his order of March 4, 1944, to be excessive profits under the Act. By stipulation between the parties, no action will be taken by the Government to enforce the Secretary's order of March 4, 1944, other than the withholding of an

[19] In view of what it deemed to be a "plain" grant of jurisdiction by Congress to the court of equity to hear the proceeding, this Court found it unnecessary to decide in that case "whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a federal agency * * * and yet limit its enforceability to administrative determination, despite the existence of federal courts of general jurisdiction" (p. 307).

equivalent amount otherwise due to appellant (R. 17, 45). Hence, appellant's position is simply that of a general creditor of the United States against whose claim for monies otherwise due it under contracts the Government seeks to set off an amount alleged to be due under the Renegotiation Act.[20] The prayer for an injunction against the Secretary's withholding or causing the withholding of such funds (R. 16) is an attempt to secure their payment. In the words of the court below, "Stripped of all legal verbiage, and reduced to its simplest terms" appellant seeks "to force the United States, through Forrestal in his official capacity—as its officer—to perform *its* promise to pay" (R. 59). Appellant has an obvious remedy at law to obtain such relief and at the same time to test the validity of the Act and the propriety of the set-off, insofar as it may be

[20] Appellant states that at "the time the complaint was filed [the Secretary] had threatened to not only withhold amounts otherwise due appellant from the United States, but as well, amounts due it from its numerous contractors," and argues therefrom that the jurisdiction of the court below is to be considered in the light of these facts alone (App. Br., p. 28). It is clear, of course, that appellant is bound by the stipulation between it and the Secretary (R. 17–18), under which the sole enforcement action of the Secretary is the direction to withhold an equivalent amount otherwise due appellant under Government contracts. In any event, the jurisdiction of a court of equity is not dependent solely upon the facts existing at the time the complaint is filed, but may take into consideration all facts properly before the court. *Crozier* v. *Krupp*, 224 U. S. 290; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

entitled to judicial adjudication of this issue. Appellant need merely bring suit against the United States in the Court of Claims for the amount due to it under its contracts. When the Government, in such a suit, asserts the right to set-off against that claim the amount alleged to be due under the Renegotiation Act on account of excessive profits as determined by the Secretary's order, appellant may obtain a decision, subject to review by this Court, of any questions which he is entitled to have judicially considered. And the Court of Claims, if it decided in favor of appellant, could grant a judgment for all the money withheld under the Renegotiation Act. The availability at law of a remedy which is at least as "plain, adequate, and complete" as the remedy in equity is fatal to injunctive relief in any federal court. Judicial Code §267, 28 U. S. C. 384; *Hurley* v. *Kinkaid*, 285 U. S. 95, 105; *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 283. The issue raised in the complaint below as to the constitutionality of the Act does not affect these principles. "The fact that it would be convenient for the parties and the public to have promptly decided whether the legislation is valid, cannot justify a departure from * * * established principles of equity practice" (Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345); see also *Arkansas*

Building Association v. *Madden*, 175 U. S. 269, 274.

Whatever may be the effect of appellant's failure to pursue the Tax Court remedy provided by the statute, and however it may limit the issues of which appellant is constitutionally entitled to a judicial determination, appellant's remedy in the Court of Claims is as adequate for the determination of those issues as a suit in the district court. Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 323.[21] The exclusiveness and finality of the Tax Court's jurisdiction are hence immaterial upon the question of equity jurisdiction.

Appellant attempts to support equity jurisdiction by arguing that the delay in ultimately refunding excessive profits erroneously collected by the Government would cause irreparable injury since the recovery would not include interest.

[21] Appellant in its brief (p. 27) cites, as supporting equity jurisdiction, the allegations in the complaint (R. 15) that the Secretary's "threat to cause appellant's customers to withhold payment on their contracts would seriously interfere with the business relations between appellant and its customers to its serious financial disadvantage," and that such withholding would oblige appellant "to bring a multiplicity of costly and vexatious suits against numerous of its customers scattered throughout the United States." These allegations are rendered irrelevant by the stipulation between the parties (R. 17–18) and the Secretary's affidavit (R. 41–46), showing that enforcement of the Secretary's order of March 4, 1944 is limited to the withholding, from amounts otherwise due to appellant from the United States, of $1,014,873.78, the full amount of the claim for excess profits. No other method of enforcement need or will be used.

(App. Br., p. 27.) This contention is rendered academic by a recent statute directing the award of interest by the Government on all refunds "erroneously collected by the United States pursuant to a unilateral determination of excessive profits." (Pub. L. No. 40, 79th Cong., 1st Sess., approved April 25, 1945).[22] Even without that statute, the inability to obtain interest against the United States in the Court of Claims on a contract claim does not render that remedy inadequate so as to support equitable jurisdiction; otherwise, specific performance could be had in every case to compel payment of a liquidated sum due under a Government contract—a principle for which no one could seriously argue. Moreover, since as a general rule "interest does not run upon claims against the Government" (*Smyth* v. *United States*; 302 U. S. 329, 353), appellant's remedy in equity would be no better than in the Court of Claims.[23]

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[22] That statute appropriated up to $15,000,000 for "Refunds under Renegotiation Act", "to remain available until June 30, 1946, * * * to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *."

[23] Tax cases cited by appellant, such as *Educational Films Corp.* v. *Ward*, 282 U. S. 379 (App. Br., p. 27), are not apposite. In that case, the aggrieved taxpayer attempted to enjoin collection of money lawfully in his possession; here the money which appellant seeks is in the lawful possession of the United States.

III

This Suit Is One Against the United States To Which Congress Has Not Consented

The instant suit is in form one against an individual—James V. Forrestal—and appellant strenuously maintains that he is to be treated here as a private individual and not as Secretary of the Navy acting in behalf of the United States (Br. pp. 19–21). So to treat him would be unrealistic and inaccurate in the extreme. Nothing Forrestal has done or may do as a private citizen is complained of here; all his acts have been or will be done only in his official position as Secretary or Under Secretary of the Navy. The renegotiation order of March 4, 1944, was issued by him as Under Secretary of the Navy pursuant to an Act of Congress (R. 5–6) and his directions to the Treasurer of the United States to withhold from appellant monies in the Treasury which would otherwise be due from the United States were obeyed because Forrestal was acting as a Federal official with statutory authority to hold up payments out of the United States Treasury.

But it is in any event immaterial that the nominal defendant is Forrestal. The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [Sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judg-

ment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. If the officers who are sued in their individual or personal capacity have no individual or personal interest in the controversy, and if the suit seeks to control their actions and exercise of functions as officers of the United States, the immunity from suit is applicable.[24] Measured by these criteria, the suit below was properly dismissed as one against the United States, for at least three reasons:

1. The sum of about $1,000,000 which the Secretary of the Navy, pursuant to statutory direction, has ordered the Treasurer of the United States to withhold "from amounts otherwise due to the contractor" is in the Treasury of the United States. The only prayer for relief here relevant, in view of the stipulation and the Secretary's affidavit (R. 17–18, 45), is appellant's request (R. 16) that the Secretary be enjoined from "Withholding or instructing or requesting the United States * * * to withhold any monies due, or to become due" to appellant "*from the United States* or any agency or instrumentality thereof."[25] (Emphasis added.) This in effect seeks to com-

[24] *Belknap* v. *Schild*, 161 U. S. 10, 25; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

[25] Appellant's prayers below for an injunction to restrain Forrestal from instructing other contractors to withhold any monies due to appellant, from further proceedings to rene-

pel payment out of the Treasury of a claim against the United States, arising out of contracts between appellant and the United States. Since only the withholding order precludes the Treasury from paying appellant the sums otherwise due to appellant under its Government contracts, an injunction against withholding is equivalent to a direction to pay money out of the Treasury.[26] As this Court has recently stated, "when the action is in essence one for the recovery of money" from the sovereign, it is the "real, substantial party in interest and is entitled to invoke its sovereign im-

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gotiate appellant's contracts, and from other proceedings to enforce the March 4, 1944 order (R. 16) need not be considered further since the stipulation and the Secretary's affidavit (R. 17–18, 41–46) have eliminated all of the acts described from this case.

[26] Appellant argues that it "is not asking any relief which will require this Court to produce one cent for it," and that this "Court is not being asked to require Congress to appropriate funds because the record shows vouchers payable to appellant from funds already appropriated, have been issued and are in the hands of appellee as security" (App. Br., p. 19, see also p. 15). The Secretary's affidavit adequately rebuts this hypertechnical quibble. As pointed out therein, the sum of approximately $1,000,000 "as to which payment has been suspended, is being held" by the Treasury of the United States "as an obligated but unexpended balance in the particular appropriation accounts of the Navy Department applicable to the various contracts with the plaintiff" (R. 46). Since, as appellant points out, vouchers for such amount have already been issued, and issuance of the checks to appellant under such vouchers has been prevented only by the Secretary's withholding order, the lifting of the withholding order would be followed in due course by payment to appellant from the Treasury of the United States of the sums withheld.

munity from suit even though individual officials are nominal defendants." See *Ford Co.* v. *Department of Treasury*, 323 U. S. 459, 464; see also *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.[27]

2. The direct and immediate effect of granting the relief sought by appellant will be to compel the United States to perform its promise to pay appellant some $1,000,000 pursuant to contracts with the United States. This effect is neither collateral nor accidental, for the Secretary's action complained of, and sought to be enjoined here, is his interference with such payments, otherwise due. An injunction would affect a contract of the United States, not any obligations or rights of the Secretary of the Navy. Hence this suit is in effect one for specific enforcement of a contract with the United States, and barred by its immunity.[28] Appellant is seeking "an affirmative

[27] Certain of the cases cited in this section of the brief involve the immunity of states from suit. In determining whether a proceeding must be dismissed because it is a suit against the United States, the same rules apply as in determining whether a suit must be dismissed because of the sovereign immunity of a State. *Kansas* v. *United States*, 204 U. S. 331, 341; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Hopkins* v. *Clemson College*, 221 U. S. 636, 645.

[28] *Wells* v. *Roper*, 246 U. S. 335; *Louisiana* v. *Jumel*, 107 U. S. 711; *Goldberg* v. *Daniels*, 231 U. S. 218; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571.

remedy * * * against the Government which, though in form merely restrictive of an officer, was really mandatory against the sovereign" (cf. *Goltra* v. *Weeks*, 271 U. S. 536, 546).[29]

The sovereign's immunity from this type of a suit cannot be overcome by allegations that the officer's action or threatened action was without authority in the Constitution or the statute.[30]

3. Appellant may institute suit directly against the sovereign in the Tax Court and in the Court of Claims instead of "behind its back" in an equity suit against its officer, cf. *Goldberg* v. *Daniels*, 231 U. S. 218, 222. The sovereign having consented to be sued in these designated forums, the situation is peculiarly one for the application of the "principle of immunity from litigation

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[29] *Ickes* v. *Fox*, 300 U. S. 82, heavily relied upon by appellant (Br. p. 19), is distinguishable, since the water rights there held protectible by an injunction against an order of the Secretary of the Interior had become "vested," and the suit did "not seek specific performance of any contract" but merely to enjoin the Secretary "from enforcing an order, the wrongful effect of which will be to deprive [plaintiffs] of vested property rights" (at p. 96).

[30] *Morrison* v. *Work*, 266 U. S. 481; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Louisiana* v. *Jumel*, 107 U. S. 711; *Boeing Air Transport, Inc.* v. *Farley*, 75 F. 2d 765 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

[which] assures the states and the nation from unanticipated intervention in the processes of government * * *. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interference require a restriction of suability to the terms of the consent, as to persons, courts and procedures.'" *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 53–54; see also *Ford Co.* v. *Department of Treasury*, 323 U. S. 459.

It is enough to sustain the judgment below that Congress did not consent to have the United States sued in the type of case here involved.[31]

[31] In *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, which appellant urges controls the case at bar (App. Br. pp. 14–16), this Court upheld an injunction against the collection of taxes under the Agricultural Adjustment Act, one week after that Act had already been declared invalid in *United States* v. *Butler*, 297 U. S. 1. Nothing in the opinion implies that the Court would have sustained the suit as a means of testing the validity of the Agricultural Adjustment Act. Furthermore, in the *Rickert* case, the taxpayer was attempting to enjoin the collection of monies lawfully in his possession, demanded under an invalid act; here, the monies which appellant seeks are in the lawful possession of the United States, withheld under an Act of Congress which has not been declared invalid.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 71.—October Term, 1945.

Mine Safety Appliances Company, Appellant, *vs.* James V. Forrestal.	On Appeal from the District Court of the United States for the District of Columbia.

[December 10, 1945.]

Mr. Justice Black delivered the opinion of the Court.

After an investigation in which appellant appeared, appellee James V. Forrestal, while Under Secretary of the Navy, determined that the appellant had received a large amount of excessive profits on government war contracts within the meaning of the Renegotiation Act.[1] Pursuant to the powers given him by that Act the appellee notified appellant that unless appellant took action to eliminate these profits the Under Secretary would direct government disbursing officers to withhold payments due appellant on other contracts sufficient in amount to offset the government's loss due to the excessive profits.[2] Section 403(e) of the Renegotiation Act provides that any contractor aggrieved by the Secretary's determination may within ninety days apply to the Tax Court for a de novo trial and adjudication of the issue. The section provides that the Tax Court "shall have exclusive jurisdiction . . . to finally determine the amount . . . and such determination shall not be reviewed or redetermined by any court or agency." 58 Stat. 86. The appellant without following the procedure provided for in Section 403(e) filed this complaint in the District Court. The complaint seeks an injunction and declaratory judgment. It alleges among other things that the Act is unconstitutional on many grounds; that withholding payment of the sums found to represent excessive profits would seriously interfere with appellant's

[1] 56 Stat. 226, 245; 56 Stat. 798, 982; 57 Stat. 347; 57 Stat. 564; 58 Stat. 21, 78.

[2] Section 403(c)(2) of the Renegotiation Act authorizes and directs the Secretary to eliminate excessive profits by, among other things, "withholding from amounts otherwise due to the contractor any amount of such excessive profits."

operations and with production of critical materials for the government; that due to statutes and executive orders which make many of the appellant's contracts confidential and secret, it will be impossible for it to carry on proceedings to enforce its contract rights until these restrictions are lifted; and that it is without a plain, adequate and complete remedy at law.[3] The District Court composed of three judges dismissed the complaint as a suit against the United States to which the sovereign had not consented, 59 F. Supp. 733, and the case comes before us on direct appeal. 28 U. S. C. § 380a. Here government counsel, appearing for the Secretary, advance the District Court's grounds and contend further that the judgment below be affirmed because appellant failed to exhaust its administrative remedy and to follow the statutory procedure in not first going before the Tax Court to which Congress has granted "exclusive" jurisdiction and because it does not appear that appellant is without an adequate legal remedy.

We think the government is an indispensable party in this case, and since it has not consented to be sued in the District Court in this type of proceeding, the complaint was properly dismissed against the government officer. *Minnesota* v. *United States*, 305 U. S. 382; *Stanley* v. *Schwalby*, 162 U. S. 255. Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, had the factual allegations supported these contentions, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e. g., *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619-620. For according to these cases, if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations including the one that the Renegotiation Act is unconstitutional are true, the

[3] Appellant also alleged below that the Secretary had threatened to instruct other contractors to withhold any moneys due to appellant. A stipulation and affidavit by the parties reveal, however, that this action will in fact not be taken. Any controversy that might have been before the court by virtue of this allegation has, thus, become moot. It can therefore not serve as the basis for the court's consideration of the constitutional and other questions here in issue. United States v. Alaska Steamship Co., 253 U. S. 113; Commercial Cable Co. v. Burleson, 250 U. S. 360; Montgomery Ward & Co. v. United States, — U. S. —. Cf. Hoffman v. Breeze Corporations, 323 U. S. 316.

fact that the Secretary had acted pursuant to the command of that statute would have made no difference. These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute. Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party. But the government does not lack such interest in all cases where the suit is nominally against the officer as an individual. The government's interest must be determined in each case "by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte in the Matter of the State of New York*, 256 U. S. 490, 500.

Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant. Nor does the record present any other circumstances that would make the Secretary suable as an individual in this proceeding. Certainly the action which the Secretary proposed to take is not a violation of any express command of Congress. Cf. *Ralston* v. *Missouri Fund Com'rs.*, 120 U. S. 390, 411; *Houston* v. *Ormes*, 252 U. S. 469; *Smith* v. *Jackson*, 246 U. S. 388. The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act[4] and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party. *Minnesota* v. *United States*, 305 U. S. 382, 388, even though the Renegotiation

[4] This is seen from the prayer for a declaratory judgment, which asks only that the Renegotiation Act be held unconstitutional.

Act under which the Secretary proposed to act might be held unconstitutional. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52, 67, 68; *In re Ayers*, 123 U. S. 443, 496, 497, 505-507; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9; *Wells* v. *Roper*, 246 U. S. 335, 337; see also *N. Y. Guarantee and Indemnity Co.* v. *Steel*, 134 U. S. 230. In short the government's liability can not be tried "behind its back." *Louisiana* v. *Garfield*, 211 U. S. 70, 78.

Affirmed.

Mr. Justice REED concurs in the result for the reason that he thinks no adequate ground is alleged for an injunction. In his view a legal remedy exists in the Court of Claims and the stipulation, referred to in the opinion, removes multiplicity of actions for relief as a possible ground.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

since objection to the amount of excess profits is waived